

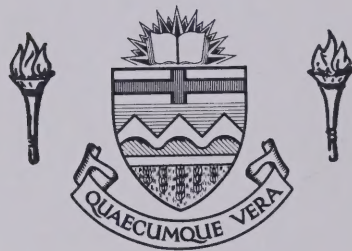
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THE INFLUENCE OF THE PARTY AUTONOMY PRINCIPLE ON THE  
CHOICE OF LAW PROCESS

BY



HANS PETER FRICK

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH  
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE

OF A MASTER OF LAWS

FACULTY OF LAW

EDMONTON, ALBERTA

SPRING 1973





THE UNIVERSITY OF ALBERTA  
FACULTY OF GRADUATE STUDIES AND RESEARCH

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research, for acceptance, a theses entitled *The Influence of the Party Autonomy Principle on the Choice of Law Process*, submitted by HANS PETER FRICK in partial fulfillment of the requirements for the degree of Master of Laws.

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TO MY PARENTS





## A B S T R A C T

*Party autonomy* is a leading principle in the private international law of contractual obligations. This principle has long been recognized by Canadian courts. Practical and economical reasons have proven that advantages offered by the '*party autonomy*' principle contribute clearly to the achievement of security, certainty and true justice in the conflict of laws.

The main problems dealt with in this thesis are the logical bases of this principle, its influence not only on the law of obligation, but also on other domains of the conflict of laws.

The '*party autonomy*' principle which substitutes the objective criteria of connection by a subjective express choice of the applicable law, can only influence a choice of law process regarding legal relations with a concern of the parties as individuals. A strong personal interest therefore, can be found in the law of contracts, the law of torts and the law of matrimonial relations.

This thesis calls for an open-minded application of the '*party autonomy*' principle and attempts to expand its application beyond the law of contracts, taking into account the nature of the legal relations and the inherent dangers in applying it.



'Man cannot discover new oceans unless he has the courage to lose sight of the shore.'

*Andre Gide*





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# CHAPTER ONE

## AUTONOMY IN PRIVATE LAW

This first chapter attempts to deal with autonomy in private law as an outflow of the ideas of freedom, which characterize our system of law. From this conception of freedom, the foundation of our system of law, the idea of autonomy in general and especially the idea of private autonomy and party autonomy has to be derived and these ideas have to be justified.

This object will be attained by way of looking at the origin of these liberal ideas. Then, the development of these ideas of freedom will lead to the concept of private autonomy and party autonomy as consequences originating from the liberal concept of the system of law. Private autonomy will be dealt with in this chapter, while the second chapter will be devoted to party autonomy.

The idea of law is an all embracing concept covering the most different aspects of law and influencing all its issues, and the description of this concept would cover a thesis in itself. It cannot, therefore, be the goal of this introductory chapter to give an abundant conspectus of these ideas.



## I. The Liberal Conception of a System of Law

Our system of law, private law as well as public law, is based on a liberal idea.<sup>1</sup> This concept includes the natural liberty of man, which permits his ethical development, the possibility of establishing a sphere within which the individual can act and, thereby through his own freewill, establish and form his relations according to his own desires. These ideas, the liberal concept in other words, are the basic value of a system of law.<sup>2</sup>

This liberty however, is not comprehensive. There is a need for order within a society of man, an order both for the sake of society and of the individual, and for present purposes this will be accepted as a matter of fact.<sup>3</sup> The idea of the natural liberty of mankind, on the one hand, and the necessity of order, on the other hand, has been realized in our system of law in an ideal manner.<sup>4</sup>

### 1. Origin of the Liberal Conception

The well known Roman law system's LIBERTAS seemed to be based on a Greek model developed by Aristotle.<sup>5</sup> In the Roman law, liberty<sup>6</sup> became one of the principles on which the whole system was based.<sup>7</sup> LIBERTAS was one of the most praised and defended privileges.<sup>8</sup> This new philosophy affected the spectrum of mankind, creating an independence at least for the LIBERI. In this vein man was to be free, he was to be master of his own fate and, for his personality's sake, he was to have a sphere within which to act and to create legal relations; and this sphere was to be his own.





In the beginning of the first millenium, the feudal system narrowed down all these liberties. Man became dependent upon the nobility and the ecclesiastics who were a very small number compared with the common people. Only the nobility, the high dignitaries of the church and some particular free-born men enjoyed some basic rights. The renaissance, however, returned to the old Greek and Roman idea of LIBERTAS and together with the reformation, the social and the commercial revolutions re-established the human being as the focus of all thought and acting. The Arts, the *septem artes liberales*, influenced both the scholar and the judge persuading them to reconsider the Roman law and receive those ancient ideas and institutions.

These freedoms could only be properly recognized in a liberal system of law. It took a reverse of the trend during the period of absolutism to open the door finally to liberalism.

## 2. Development of the Liberal Conception

Anglo-American and European liberalism adopted this philosophy and substituted it for the feudal law system. First of all, however, it would appear that the MAGNA CARTA of 1215<sup>9</sup> could be considered as the cornerstone of the English liberties, despite the fact, that the English King engaged himself only so far as to respect his subjects vested rights. The subsequent confirmations of the MAGNA CARTA usually referred to the grant by King Henry III in 1225 as Charter of Liberties.<sup>10</sup> It was only in the 17th Century, during the fight against the absolutism of the Stuarts, that Parliament enacted the Petition of Right (1628)<sup>11</sup> and the Bill of Rights (1689)<sup>12</sup> recognizing



basic rights of the citizens. In England, the basic rights of freedom were only negatively defined through Acts of Parliament, and the English constitutional law guarantees no basic rights of freedom.<sup>13</sup>

In the United States the original *Ten Amendments* (1791) guarantee liberty and rights to the American people. They were inspired by stoical sources as well as by natural law and were closely connected to the English Bill of Rights. The statement at the head of the *American Declaration of Independence* 1776 recognized the existence of certain basic rights as well.<sup>14</sup>

During the French Revolution the modern political idea of freedom was developed, namely the freedom within the state, guaranteed by that particular state. At the beginning of the 17th century, man became more and more conscious of these freedoms - called *les droits de l'homme* or the human rights. They were guaranteed in almost all constitutions. A new order of values was established.<sup>15</sup>

A human being was to be autonomous, he had to have a completeness of powers, and because these powers existed before ever a state and a social order came into existence, these powers were given to man in his own behalf. It was to be recognized by the law a priori. On this basis man could not be regarded as a tool in the hands of the state and the order, but government and law should subsist to guarantee these pre-existing freedoms.



Freedom, as it is generally used, has different aspects.

It can be defined as to be free to do what one wants to do without any interference and to achieve the highest of the possible degrees of self-realization.

Negative freedom then is the absence of any constraint and restraint. A man is free to the extent that no one inconveniences his activity; that is, no one makes him to do what he does not want to do (absence of constraint) and no one prevents him from doing what he wants to do (absence of restraint or negative constraint). In that sense he is free to do what he wants. It is a *laissez-faire* freedom as well as a potential freedom, in that it is a freedom of choice.

Positive freedom is a creative freedom, since it invokes the possibility of making the best out of what man can; in other words it is the concept of self-realization. There is a further distinction in a positive freedom between internal positive freedom and external positive freedom. Internal positive freedom treats of the inside of the human being, that is, the condition of a mind and the character of a human being as a rational moral agent. This agent has to be free to achieve his best potential. External positive freedom is not the absence of constraint - positive or negative - as such, but external positive freedom is assured by a system of rights maintained by law and free society.

Generally, negative freedom is the jungle of impulse of everyone-for-himself<sup>16</sup>; positive freedom is the civilizing impulse of let's do-it-together.<sup>17,18</sup>





In the nineteenth century, writers<sup>19</sup> and judges<sup>20</sup> regarded freedom of contract as an end in itself.<sup>21</sup> The parties were free to enter voluntarily into any sort of contract based on any conditions, introducing qualifications and exemptions for the liability and it was immaterial if one of the parties was in a stronger position to bargain than the other. The function of the law was to enforce such contracts.

Today freedom of contracts seems to be a myth when one party has no alternative between doing or living without the services or the goods offered, and accepting the terms set by the stronger party.<sup>22</sup>

It is obvious that a system of law based on an absolute freedom cannot exist. Social and co-operative existence necessitating the showing of consideration for your neighbour, demand that freedom has to be restrained.<sup>23</sup> Viscount Simonds cites the famous sentence: "Amongst many other points of happiness and freedom which your Majesty's subjects have enjoyed, there is none which they have accounted more dear and precious than this, to be guided and governed by certain rules of law....".<sup>24</sup>

It will always be in the discretion of the law to set limits restraining these liberties, provided it is done for the benefit of freedom and especially to guarantee freedom.

These disadvantages have been offset by many statutes<sup>25</sup> which introduce certain terms into contracts which the parties cannot



exclude, or they impede introducing certain terms by declaring them void.

In the historic view, it seems that the existence of these freedoms is the starting point, and the systems of law have been built to enclose these freedoms taking to account and honouring all their values, whatever they may be. Logically, it is for the law to give freedom to man by virtue of delegation.<sup>26</sup>

### 3. Consequences

The idea of responsible self-realization shows effects in almost every domain of law. The liberty of the person in regard to a personal development and to activities according to his aptitude and preferences is the first aspect to be mentioned here. Furthermore, everybody is able to enter into obligations of any content, to found co-operative relations, to be master over things, to dispose of and to decide who will be bearer of the rights he enjoyed. This conforms to the freedom of contract, the freedom to associate, the freedom of having property and the freedom of wills.

This idea of freedom is reflected as *private autonomy*<sup>27</sup> in internal municipal law and as *party autonomy*<sup>28</sup> in international private law.

Autonomy in a legal sense means to demand and to have the right to legislate on behalf of yourself. Whereas in the earlier centuries only certain corporations and guilds and aristocrats were



endowed with these rights, today they belong to every individual. Private autonomy is one of the primary decisive principles in our private law system; it is private autonomy which leads man to be the rational moral agent of his relations. Therefore, private autonomy is the principle of self-determining the legal relations by man through his own free will.

Party autonomy is just as decisive a principle in private international law as private autonomy is in internal law. By means of party autonomy man becomes the rational moral agent for his relations on an international plane. The meaning of party autonomy is to uphold the decision of replacing the objective criteria of connections by an express consensus of the parties, concerning the law applicable to their relations.

## II. Private Autonomy

Private autonomy is regarded as an effect of this liberal idea which dominates our system of law. It determines as a primary principle the character of our system.<sup>29</sup>

As a principle, the system of law does not infringe private autonomy, but on the other hand, private autonomy finds its range of application only there, where no rules of public law or rules with a public effect exist. But within these limits, everyone is permitted, not only to create his legal obligations according to his will, but also everyone enjoys moreover in his being and acting as a man, the natural freedom to do what he wants.<sup>30,31</sup>



But this power of free will and self-determination however, finds its limits also through the recognition by the law itself. Therefore, this power must be recognized as a value; the existence and recognition of this power of free will and self-determinism is a primary goal of our liberal concept.

It is obvious that this freedom does not grant *autonomy* and that the individual cannot put into force his own codes genuinely.<sup>32</sup> Society, not the individual, creates law; the individual can never be his own legislator, because he can never be his own judge in his own cause. Only legal relations which are part of a legal system as such can be formed by the individual. It is only the law that determines form and content of the autonomous liberty to act. It is the law which gives the individual the capacity to form the legal relations by himself; based on this reasoning, private autonomy is a derivative autonomy.

The recognition of private autonomy by the law on the one hand and the setting of limits by the selfsame law on the other hand is the realization of the idea that the weaker individual is to be protected.<sup>33</sup> This protection can be achieved by restraining the dominant party's liberty, dominant as a fact of predominance and of psychological or intellectual advantage. But in this case, the protection of the one liberty is attained by limiting the other liberty, both of them are -regarding their value- at the same level and both of them need the same area to expand. It is not quite easy to answer the question at whose cost this protection will be reached.





There is then an ambiguity. On the one hand the legal act based on the private autonomy principle cannot be qualified as *law* because the individual cannot create *law* by himself. On the other hand, the individual act must claim the qualification *law* to pass and to be recognized on the whole as *law*. This can only be solved by the presumption that every act done within these limits fixed by the system of law would be recognized as *law*.

The step from the municipal plane up to the international plane should be an easy one. The second chapter will treat the effects of the liberal concept of law on the conflict of laws.



### III. Footnotes to Chapter One

1. The liberties in private law found their exposure in many ideas and institutions of public law, which formed the ideas of the liberal state. Though democracy as well as private law are based on the same principles, the principle of parity in the eyes of the law and the principle of freedom.
2. Savigny, *Private International Law*, Guthrie's translation 198, 209/210.
3. Blackstone, *Commentaries on the Laws of England*, 125:  

"The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are unusually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when He endued him with the faculty of free will. But every man, when he enters into society gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. ....Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human law (and no farther) as is necessary and expedient for the general advantage of the public."
4. *Infra* 9 et seq.
5. Aristotle, *Politica* VI.
6. Florentin, *Digesta*, (1.5) 4 pr: "Libertas est (naturalis) facultas eiusquod cuique facere libet, nisi si quod vi aut iure prohibetur."
7. Schulz, *Principles of Roman Law* 140; Chase Greene, *The Achievement of Rome* 186.
8. Cicero, *ad Atticum* XV 13.3: "....de libertate retinenda, qua certe nihil est dulcius"; and *in Verrem* II V 9.23: "....haec quae vel vita redimi recte possunt, aestimare



pecunia non queo."

Diegesta Iustiniani (50.17) 106: "Libertas inaestimabilis res est."

9. *Statutes of the Realm*, i,107 (in Latin) 18 Edward I.
10. It is, actually, in all material respects, the same as John's Charter of 1215; see Jennings 11.
11. *Statutes of the Realm*, v,23f; Charles I, c.2.
12. *Statutes of the Realm*, vi,142 ff.; I William & Mary, sess. 2, c.2.
13. See *Liversidge v. Anderson* [1942] A.C. 206 *et seq.* and *The Alberta Bill of Rights*, assented to November 15, 1972 Art. 1 It is hereby recognized and declared that in Alberta there exist, without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely:
  - a) the right of the individual to liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
  - b) the right of the individual to equality before the law and the protection of the law;
14. "...that all men are created equal, that they are endowed...with certain malienable Rights, that among these are life, liberty and the persuit of happiness."
15. See 'La déclaration des droits de l'homme et du citoyen de 1789'.
16. *Supra* n.3.
17. MacGuigan, *Civil liberties in the Canadian Federation*, (1966) 16 *University of New Brunswick Law Journal* 1, at 5.
18. See Milne, *Freedoms and Rights*, Franklin, *Free will and Determinism*.
19. Dicey, *Law and Opinion*, 150 *et seq.*
20. Jessel M.R. in *Printing and Numerical Registration Co. v. Sampson* (1875) L.R. 19 Eq. 462; Lord Bromwell in *Manchester, Sheffield and Lincolnshire v. Brown* [1883] App. Cas. 703, 716-720; *Salt v. Marquis of Northampton* [1892] A.C. 1, 18/19.
21. See *Chitty on Contracts* (22nd ed.).





22. Telephone services, electricity and power, air transport, railways, etc.
23. In the United States it is a duty of the States to ensure the rights to make free contracts on the one hand and to set limitations for the community's and the State's sake on the other hand.

Mr. Justice Field said in *Crowley v. Christensen*, 137 U.S. 86 (1890) at pp. 89/90: "...the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country as essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law."

Mr. Justice Brown said in *Holden v. Holden*, 169 U.S. 366 (1897) at p. 391: "This right of contract however, is itself subject to certain limitations which the State may lawfully impose in the exercise of its police powers. While the power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century..."

Mr. Justice Peckham said in *Allgeyer v. Louisiana*, 165 U.S. 578 (1896) at p. 591: "In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto, and although it may be conceded that this right to contract in relation to persons or property or to do business within the jurisdiction of the State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes..."

In *Lochner v. New York*, 198 U.S. 45 (1904) at p. 53: "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution (*Allgeyer v. Louisiana*), 165 U.S. 578 (1904). Under that provision no state can deprive any person of life, liberty or property without due process of law."

24. *Shaw v. Director of Public Prosecutions*, [1961] 2 All E.R. 446 at 452.
25. Cf. Credit and Loan Agreements Act R.S.A. 2 Chapt. 73; Unconscionable Transactions Act. R.S.A. 6 Chapt. 377. See Graveson, *The Movement from Status to Contract*, 4 (1940-41) M.L.R. 261.



26. Schnitzer, *Jurisprudence (Rechtslehre)*, 413.
27. *Infra* II.
28. *Infra* chapter two.
29. *Supra* 4 *et seq.*
30. A definition of private autonomy restricted on principles of contracts only is too narrow. On the contrary, it is a question which stretches out beyond the law of contracts, it is a question what self-determination really can regulate and realize.
31. This freedom to act, always within the limits set out by the law needs no other reasoning besides that man wants it. Recognizing private autonomy means recognize the sentence: "stat pro ratione voluntas".
32. *Supra* 8.
33. *Supra* 7.



## CHAPTER TWO

### AUTONOMY IN PRIVATE INTERNATIONAL LAW

The second chapter deals with the influence of the liberal conception, inherent in a system of law, on private international law. The idea of autonomy in the choice of law process will be the main issue.

First of all, this autonomy has to be defined in order to deal with clear principles later.

In a second part, the autonomy principle must be justified by practical and logical reasoning.

In the third and last part, the problems of limited or illimited autonomy will be dealt with.

#### I. The Meaning of *Autonomy* in Private International Law

Autonomy in private international law has no other meaning than in internal law. It is the liberty of man, permitting his ethical development, the possibility of establishing a sphere in which the individual can act, by forming his relations according to his own desires and through his own free will. It is responsible self-realization.<sup>1</sup>

Autonomy in private international law means foundation and conditioning of the international legal relations according to the free will of the parties involved.



What the expressions "predominance of the parties will" and "party autonomy" really mean, has been deduced dogmatically in the last few years only. Unclear and unprecise expressions have been replaced by unequivocal terms, in order that the former do not lead to confusion anymore.

Today party autonomy and incorporation of foreign law<sup>2</sup> face each other and a clear and careful distinction is most important.

#### 1. The Origin of Autonomy in Private International Law

Both of these principles, incorporation of foreign law and party autonomy find their origin in the idea that the most appropriate and adequate solution in conflict of laws would be the one in which the parties regulate their legal relations themselves. The conception of LIBERTAS in Roman law<sup>3</sup> seems to be the origin of the possibility of forming legal relations on an individual basis.<sup>4</sup>

The question whether the principle of incorporation of foreign law and party autonomy goes as far back as to the Roman or even Egyptian law at the time of Ptolemy would ask more and intensive historical research. However, it is interesting to note that two Englishmen, Grenfell and Hunt, found an explication to a curious custom of the ancient Egyptians, which allows us to draw conclusions as to which law was applicable to regulate differences between Egyptians and Greek merchants who had established colonies in Egypt. The Egyptians used to stuff the bodies of dead crocodiles, which were regarded as sacred in parts of ancient Egypt, with legal scrap before they entombed them. On these papers the two Englishmen found a royal decree regulat-





ing conflicts of law. This decree determined the applicable law for contracts with foreigners (Greeks) taking into consideration the language of the contract. The parties had the choice of going to a Greek or an Egyptian notary's office and to write the contract in the Greek or the Demotic language. If it had been written in Greek form, it would be tried before the Chrematists, the Greek courts in the colonies; if in Egyptian form, before the Laocrites, the native courts. By means of a choice of the language the parties could make a choice of law.<sup>5</sup>

Catellani<sup>6</sup> suggests that the possibility of choosing the law governing relations with *alieni* existed already before the Justinian era in Rome. To solve conflicts of laws between the particular law and the *ius gentium* parties had the possibility of choosing one of these systems of law, which mostly happened through the choice of the *locus stipulationis*.

Many of the learned writers however, find the proper origin only in the town laws of the upper Italian townstates and their doctrine of *statuts* in the 13th century. But such famous *statutists* as Bartolus and his scholars Aldricus, Accusius and Carolus de Tocco, did not know the direct influence of the parties will on the applicable law. It was Rochus Curtius who based the application of the *lex loci contractus* on the free submission of the parties to this particular system of law.

Other writers refer to the autonomy in private international law as a discovery of DuMoulin, and the liberalistic era of the *Enlightenment* and suggest that up to this epoch party autonomy was only to give reasons for the objective connecting factor in the conflict rules.<sup>7</sup>



In this context however, attention will be drawn only to the relation between the Roman law LIBERTAS and both the foreign law incorporation theory and the party autonomy theory. It is precisely because of the common origin of these principles in Roman law, that they have to be separated severely.

Party autonomy,<sup>8</sup> defined as the principle that legal relations in private international law are governed by the law the parties intended to be applied, seems to be the younger of these principles. Therefore, reading literature and textbooks of the beginning of this century, the expressions *party autonomy* or *Parteiautonomie* or *autonomie de la volonté* mostly have the significance of incorporation of foreign law.

In this sense, to avoid misunderstandings while studying older literature, the principles of incorporation of foreign laws and of party autonomy have to be characterized.

## 2. The Incorporation of Foreign Law

The principle of incorporation of foreign law has nothing to do with the choice of law problem. Its sphere of action is within the applicable law as such. The primary applicable law grants the freedom that the parties can, within its *ius dispositivum* form the contents of their legal relations.<sup>9</sup> Thus the parties to an Alberta contract for the sale of goods may expressly provide that their duties with regard to performance shall be regulated by the rules contained in the Swiss Code. Moreover, an Alberta party and a German party to a sale of cattle contract may choose the Argentinian law to govern their con-



tract but the Swiss Code to regulate their duties with regard to performance. Whether this particular term incorporated in this manner is valid and effective must be determined by the proper law, the Argentinian law.

Therefore the applicable material law has to be known. It is this system of law which limits through its *ius cogens* -its imperative material rules- this freedom. This freedom is part of the internal material law and it is nothing other than private autonomy, namely the parties faculty to create their legal relations at their discretion.<sup>10</sup> Not only is the freedom an integral part of this *primary applicable law* but also the *ius cogens* limiting this freedom; and within this *ius cogens* the parties find the limits of their creational freedom.

In this sense, the parties can submit to norm contracts, they can agree standard form contracts, they can, to regulate possible disputes, provide for a specific solution by nominating an arbitration panel, or they can incorporate foreign law into their legal relations and refer to it as to specific legal consequences. The parties can even, keeping in mind the limits set by the *ius cogens* of the applicable law, choose a foreign system of law as a whole.<sup>11</sup> The legal relationship, however, must be subordinated to the *applicable law as such* in spite of the choice of individual foreign rules or the choice of a foreign system as an entirety. Such a reference is a term of the contract and never has an influence on the choice of law process in private international law; the *statute* of the contract remains the same, namely the *applicable law as such*.<sup>12</sup>





### 3. Party Autonomy in Private International Law

The sphere of action of party autonomy is totally different from the one of the incorporation principle. While the latter is restricted to arranging the contracts content, party autonomy answers the choice of law question, and affects the conflict of laws problem. Party autonomy grants the parties the freedom to choose by themselves the applicable law governing their legal relations.

The logical basis of such a possibility of granting this freedom must therefore be considered in the following discussion. A second question will be the question of whether this freedom can prevail against the imperative rules of the *applicable law as such* and a third question to answer is whether such a freedom should only be exercised within certain limits.

## II. Logical Requirements of Party Autonomy

### 1. Practical Reasoning for the Necessity of Party Autonomy

Party autonomy alone excludes any uncertainty, any inadequacy and any injustice which adhere and will always adhere to an objective choice of law rule. Choice of law in the sense of an express choice of law by the parties determines the applicable law in a clear and conclusive way.<sup>13</sup> Through an express choice of law by the parties internal, material law will be chosen, whereby an eventual *renvoi* or transmission<sup>14</sup> is excluded a priori. Such a solution is just; by the means of party autonomy and express choice of law by the parties, the parties can take into consideration all possible circumstances which may influence their legal relations and by means of choice of the ap-





plicable law parties know what they can and what they have to expect. The opportunity to foresee eventual legal consequences, and in particular the security in jurisdiction, which are both postulates of primary order to reach undoubtful results in private international law,<sup>15</sup> can only be reached by giving the parties the freedom to choose the applicable law.

## 2. The *lex fori* as a Basis, Permitting the Parties to Choose the Applicable Law

The conflict rules of the jurisdiction, the *lex fori* grant this freedom of choice. This solution removes all doubts and all objections and this explanation withstands the logical demands as well.

Such objections are that the parties would find themselves in a vacuum until a system of law will be appropriate to guarantee the value and the effectiveness of their agreement,<sup>16</sup> or that the parties would stand above the law like legislators<sup>17</sup> or perhaps that first of all the parties should ask what they are able to choose before they make a real choice, have no sound basis anymore.<sup>18</sup> None of these objections should be given a hearing. All of these objections lack any sound basis because the authorization to choose an applicable law is provided by the conflict of laws rules of the *lex fori*. The objection of a *circulus vitiosus* is omitted and the question whether it is the applicable law which gives the parties the possibility to choose itself or not, is answered negatively but clearly through the *lex fori*.

The gain which will be reached through party autonomy is the help the parties give the judges to solve their not always simple duties. This does not mean however, that one has to agree with the



the opinion of Batiffol<sup>19</sup> and the greater part of the American writers.<sup>20</sup> They see in the express choice of the parties only an aid to find the objective connecting factor, through a *localization* of the legal relation. The parties never really select the law, not even when they expressly agree on choice of law. They merely localize the legal relation. The court then determines the law following their lead. In Batiffol's own words, *il faut donc rechercher dans chaque cas comment se localise le contrat d'après ses caractères propres. Or ces caractères dépendent de la volonté des parties qui peuvent grouper selon leurs convenances dans tel ou tel pays les divers actes par lesquels se manifesterait l'opération contractuelle. Bien plus, il appartient à la volonté des parties de marquer si tel acte a dans leur esprit plus d'importance que les autres dans l'économie du contrat, bref si elles entendent que leur contrat soit une 'affaire française' ou une 'affaire espagnole'....*<sup>19</sup>

The parties knowing their relations the best will always, apart from the rarest exceptions, choose the most appropriate law. The overburdened judges do not need to search intricately for the centre of gravity, the most reasonable relation and the hypothetical choice any more. Misjudgements are no longer possible, since the parties know, at the very beginning, what legal consequences occur, they know what judgment they can and they have to expect.

Only choice of law by the parties guarantees the foreseeability and legal security. By means of choice of law the parties can consider all circumstances so that an eventual decision does true justice to the case. Should the basis of that freedom be found in the



*lex causae*, all these gains would be negated and lost.

As we have seen before,<sup>21</sup> incorporation of foreign law is only possible within the limits of the permissive *lex causae*. The principle of incorporation of foreign law is deduced from an internal legal norm and in this way is more limited than party autonomy. Party autonomy determines, like a conflicts rule, the applicable law as a whole, the objective connecting factor being replaced by a subjective one. Thus party autonomy is not an arrangement of the legal relations within the *ius cogens* of the applicable law, the primary *lex causae*; party autonomy designates through an express choice of the applicable law by the parties of the *statut* of the relation.

### III. Limited or Unlimited Autonomy

#### 1. Autonomy and Internally Imperative Rules

It is obvious that by means of choosing the law governing the international relations, the *ius cogens* of the as such applicable law is evaded. But *ius cogens* is not evaded absolutely. The law chosen by the parties governs the relation including its *ius cogens*. In all cases the systems of law are exchanged for each other as a whole, including their *ius cogens*. It may be that the two *iura cogentia* of the exchanged systems do not coincide, in which case the validity will be determined by the *ius cogens* of the chosen system. The reason therefore, is that the *ius cogens* grew out of this system and is adapted to this chosen system. Practically, in all systems of law the *ius cogens* is about the same, follows the selfsame ideas and conforms to the ideas of its system; *ce sont des principes qui ont partout un contenu*



*sensiblement identique et forment le fond commun du droit des peuples civilisés.*<sup>22</sup>

## 2. Limited or Unlimited Choice of Law by the Parties

If party autonomy and express choice of law by the parties are recognized principles in private international law, the question should be answered whether this party autonomy should be unlimited and whether at the discretion of the parties, any system of law can be chosen.

Different views are represented in the literature. A great number of writers, mostly belonging to the modern generation, claim an unlimited choice of law by the parties and others consider some limitations to the choice appropriate. The most vehement advocates for an unlimited choice are Rabel and Wolff. Rabel has the opinion that, after considering all sorts and kinds of limitations, choice of law by the parties should be unlimited, "...it seems after all, that the alleged general rule limiting the choice of law by the parties to a determined number of legislations does not and should not exist".<sup>23</sup>

The same opinion has been represented by Wolff<sup>24</sup> as well as by Graveson,<sup>25</sup> Mann<sup>26</sup> and Cohn<sup>27</sup>.

Other learned writers plead a choice of law by the parties with certain limitations. The Italian writer Anzilotti demands a reasonable and normal will and that a capricious choice should be prohibited.<sup>28</sup> A German and a Swiss writer, Doelle<sup>29</sup> and Vischer<sup>30</sup> demand a





legitimate interest of the parties to apply the chosen law.

Batiffol<sup>31</sup> is representative of the *localization* theory. According to this theory, the applicable law is to be determined partly by the legislator, partly by the parties, which altogether means by the tribunal, in the end result.

Madl<sup>32</sup> whose theory is based on the socialist theory will allow a choice of law if it does not "run counter to public policy and it is not prohibited in some respect by domestic law."<sup>33</sup>

The answer to the question of limitations, and when affirmative, what kind of limitations should confine party autonomy, will be seen by dealing with the question of admitting the principle in different domains of private international law.



## IV. Footnotes to Chapter Two

1. Supra 5.
2. Usually, in the early European literature the distinction between these two principles is not quite clear. Then, later on, the distinction was made between '*materiell-rechtlicher Parteiautonomie*' and '*kollisionsrechtlicher Parteiautonomie*' which conform with the idea of incorporation of foreign law and party autonomy.
3. Florentin, *Digesta*, 1.5, 4 pr.: "libertas est (naturalis) facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur." *Supra* n.6 of the first chapter.
4. Schulz, *Principles of Roman Law*, 145: "...the Roman principle of liberty led to extreme individualism in the domain of private law."
5. Lewald, *Conflit des lois dans le monde grèc et romain*, (1946) 13 *Archaiou idiotikou dikaïou* 30 *et seq.* See also Dainese v. U.S., 15 Ct.Cl.64 and the theory of Capitulation.
6. In *Il diritto internazionale privato e i suoi recenti progressi*, Torino (1895/1902) Vol.I, 178 *et seq.*
7. See Meylan, *Les status réels et personnels dans la doctrine de DuMoulin*, in: '*Mélanges Paul Fournier* (1929) at 511-526.  
See DuMoulin, *Conclusiones de statutis et consuetudinibus localibus*, in: *Comentariis in Codicem, liberum I, titulum I*, published in *Omnia opera* 3 III (Paris 1681) 554-557.  
See Yntema, '*Autonomy*' in *Choice of Law*, (1952) 1 *Am. J. Comp. L.* 342 refers to the days of Adam Smith, Jean Jacques Rousseau and Emmanuel Kant.
8. The concept of party autonomy seems to be established by Zitelmann, *Internationales Privatrecht*, Bd. I at 160 and 270 and Bd. II at 374, as a reaction against the absolutism of the will of the parties.
9. This free right is well established, see e.g. *Re Suse and Sibeth, ex parte Dever*, (1887) 18 Q.B.D. 660; *G. E. Dobell v. Steamship Rossmore Co. Ltd.*, [1895] 2 Q.B. 408; *Rowett Leakey & Co. v. Scottish Provident Institution* (1926), 134 L.T. 660; *Ocean Steamship Co. v. Queensland State Wheat Board*, [1941] 1 K.B. 402; [1941] 1 All E.R. 158; *F. W. Jabbour v. Custodian of Israely Absentee Property*, (1954) 1 W.L.R. 139; [1954] 1 All E.R. 145; *Re Helbert Wagg & Co. Ltd.'s Claim*, [1956] Ch. 323.



10. *Supra* chapter I.
11. Bowen, L. J. in *Jacobs v. Crédit Lyonnais*, (1884) 12 Q.B.D. 589 said at 499: "It is open in all cases for the parties to make such agreement as they please as to incorporating the provisions of any foreign law with their contracts."
12. See 2 von Bar 4; 1 Zitelmann 274; 2 *id.* 373; Lewald 199; Niboyet 54; Cheshire-North 210 and Graveson 434.
13. See e.g. a case decided by the Swiss Federal Tribunal: *Guaranty A.G. v. Astra*, BGE 81 II 391: In sales contract which had relations to Italy, Yugoslavia and Switzerland the parties agreed that Italian law should govern the contract. Italian law refers back to Swiss law, the place of performance. This '*renvoi*' has not to be respected, because the parties want the Italian internal law to be applied and not the Italian conflict of laws.
14. We look at '*renvoi*' as expression only in a strict and original sense of the word, meaning a reference from a second back to a first jurisdiction's law (the whole law including its conflicts law). '*Transmission*' -a '*renvoi*' in the wider sense of the word- is the reference from a second forward to a third jurisdiction.
15. See e.g. 2 Rabel at 361: A merchant in Massachusetts (*lex loci contractus*) by intervention of a New York agent, enters into a transaction with a resident of California (*lex loci solutionis*), performance due in Connecticut (party autonomy principle is there applied). The requisites of a valid contract are established: in the Massachusetts court by the law of New York, in the courts of California by the law of Connecticut, in Connecticut courts according to the circumstances of the case, and how in New York courts nobody knows. Anton at 189: "There are good practical reasons for respecting the parties' own choice:  
1) it makes for certainty in international affairs...".
16. Neumeyer *Autonomie de la volonté et dispositions impératives en droit international privé*, (1957) Rev. Crit. d.i.p. 107.
17. Lewald 200.
18. 2 von Bar 122.
19. Batiffol 622, para. 572.
20. For the American writers see 2 Rabel at 367.
21. *Supra* 18 *et seq.*



22. Neumeyer, *loc cit.* 62.
23. *Conflicts*, 410.
24. *Private International Law*, 418, S.400.
25. *International Contracts*, 1, et seq.
26. Mann, *The Proper Law of a Contract*, (1950) 3 I.L.Q. 60.
27. Cohn, *Objectivist Practice on the Proper Law of Contract*, (1957) 6 I.C.L.Q. 373.
28. Anzilotti, *Il principio dell' autonomia*, (Diritto commerciale XXII, 1904) speaks of "una saggia e normale volontà e che una volontà capricciosa sia proibita."
29. Doelle, *Internationales Privatrecht*, 48, 113.
30. Vischer, *Internationales Privatrecht*, in 1 Schweizerisches Privatrecht, Basel und Stuttgart, 1969, at 670.
31. 2 *Conflicts*, 214.
32. Madl, *Foreign Trade Monopoly*, (Budapest 1967) 104.





## CHAPTER THREE

### THE INFLUENCE OF THE PARTY AUTONOMY PRINCIPLE ON DIFFERENT DOMAINS OF THE CONFLICT OF LAWS

In this third chapter the question will be dealt with whether party autonomy can influence the choice of law process in different domains of the conflict of laws.

This wide scope of an application of the party autonomy principle however, has to be restricted in two senses.

First of all, the term *party autonomy* or *express choice of law by the parties* has to be distinguished from the term *professio iuris*. To start with the second principle, *professio iuris* means a choice out of different legal systems to which an objective connection is already existing. In this sense, the expression *professio iuris* is more limited than the term *express choice of law by the parties*. An inherent restriction exists already through the objective connection to the eligible systems of law. NAG Art. 22 e.g. gives the possibility of a *professio iuris*:

#### Art. 22

Inheritance is governed by the law of the decedent's domicile.

However, by testament or inheritance contract, the inheritance may be subjected to the law of one's home canton.

The choice in this case is only possible between those systems of law with which an objective connection already exists; the *lex domicilii* and the *lex patriae*.



The first principle only is of interest in this chapter, the express choice of law by the parties as it is understood according to the evaluation within the second chapter. The parties' will is the connection to the foreign law. This subjective connection has the same value as the connection with the domicile or the place of action. Together with these connections, the parties' will is at the same level. Party autonomy in this sense is the only subject in this thesis.

Secondly, party autonomy or an express choice of law by the parties has its influence as a primary connection only in domains, where no intrinsic interests of third parties are threatened. Third parties are understood in a general and technical sense as parties who are not directly involved. They stand besides the legal actions but they could be affected in some way by an issue between the principal parties.

Furthermore, parties can only establish a substantial subjective connection to a foreign system of law, where issues of a highly personal character, or effects on persons, are the main questions of the choice of law process. Therefore, in a first subtitle, contracts have to be dealt with. Contracts are legal relations between parties at the same level and, in most cases, with the same bargaining power. The parties' interest is predominant and the third parties' interest, if they are not at the same bargaining level, is negligible. In a second subtitle, torts will attract attention. International torts and their legal issues are highly in the parties' interest, the parties who are involved and again, third party interests are negligible. In a third and last subtitle, matrimonial relations, relations with a highly



personal aspect have to be dealt with. The position of the third parties has to be determined according to the special nature of that relation.

The domains of property and wills, especially, are not dealt with in this thesis. Neither is properly within the formal principle mentioned above. Property rights are first of all not problems of a highly personal character nor can it be said that the third parties' interest is negligible. On the contrary, third parties' interest demand a clear and easy approach to the choice of law, which must be governed by the *publicity principle*. The same grounds have to be applied on the exclusion of the law of wills regarding a possible express choice of law by the testator: "But clearly there can be no selection by anyone of the law which is to apply on intestacy and I know of no authority to the effect that a testator can select the law which is to regulate the provisions of his will", said Lord Reid in *Philipson-Stow v. Inland Revenue Commissioners*.<sup>1</sup>

First of all international contracts will be considered. The law of contracts in internal as well as in international law is central and a principal key to the creation, change and extinction of rights by conscious individual action.<sup>2</sup> Although unilateral and voluntary obligations are not dealt with as contracts anywhere over the world, in private international law the principle of contracts applies also to such obligations.<sup>3</sup>

There are many other situations in which the law of contracts can be applied by analogy. Therefore, the first subtitle will



be devoted to it.

### First Subtitle: CONTRACTS

In this first subtitle, attention will be directed to the connection between the autonomy theory and the proper law theory. The proper law theory will be described shortly and by the means of looking back to its development, the term proper law will be defined for the purpose of this thesis. This will be necessary to establish a connection between the autonomy theory and the proper law theory and to understand better the autonomy concept.

A second part will show that the autonomy principle has been accepted almost all over the world and therefore needs no more justification.

However, in a third part, the need for a limitation of such autonomy in international contracts has to be examined.

## I. The Proper Law and the Autonomy Theory

### 1. The Proper Law Theory

#### A. Origin and Development in England

The beginning of the proper law doctrine goes as far back as into the 17th century. The *lex loci contractus* principle lost its appeal for the first time in a case of marriage settlement. In *Foubert v. Turst*<sup>4</sup>, a case in 1703, counsel argued that "all lawful contracts as well as marriage, as relative to anything else, ought to be fully performed between the parties and their representatives, ac-





according to the apparent intent of such contract...".<sup>5</sup> It seems that this is the very first formulation of doubting of the rigid *lex contractus*, influenced by the Dutch Huber's *De Conflictu Legum*<sup>6</sup> which was published towards the end of the 17th century.

In a case in 1742, in *Connor v. The Earl of Bellamont*<sup>7</sup>, the Lord Chancellor accepted in some way the idea that the obligation of a contract can be governed by some other law as well as by the *lex loci contractus*, and he applied Irish law on an interest debt payable on a contract made in England but secured on Irish immovables.

In 1742 as well, the Scottish case of *Lovat v. Forbes*<sup>8</sup> echoed the influence of Huber's idea for the first time in Great Britain: "Where the parties in contracting had another place in mind, the place where the contract was entered into should not necessarily be applied".<sup>9</sup>

Writers generally agree that in England the principle has been established for some considerable time and has been recognized since 1760 in the *Robinson v. Bland* case.<sup>10</sup> In this case, Lord Mansfield, also influenced by Huber's statement,<sup>11</sup> said that: ".....the general rule established ex comitate et iure gentium, is that the place where the contract was made and not where the action is brought is to be considered in expounding and enforcing the contract. But this rule admits of an exception when the parties (at the time of making the contract) had the view to a different kingdom,... The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country as a rule by which it is to



be governed".<sup>12</sup> While *Robinson v. Bland* does not accept an express choice of law by the parties as a matter of fact, since Lord Mansfield's dictum in which he mentioned the express choice of law by the parties as well, the party autonomy principle found its authority.

In the case *Hamlyn v. Talisker Distillery* (1894)<sup>13</sup> for the first time a real express choice of law was decisive to answer the question of the law applicable to an international contract. In this case, a contract was made in England between an English and a Scottish firm to be performed in Scotland. The contract had, as an integral part, an arbitration clause providing that any dispute arising out of the contract was to be settled by arbitration by two members of the London Corn Exchange, or the umpire, in the usual way. Lord Ashbourne said: "Were it not for the arbitration clause, I should assent to the conclusion that the parties contracted solely with a view to the application of the law of Scotland (as the law of the place of performance)".<sup>14</sup> Lord Herschell said: "It is perfectly competent... to indicate... which system of law they (the parties) intend to be applied to the construction of the contract and to the determination of the rights arising out of it".<sup>15</sup>

Therefore the construction of the arbitration clause was governed by English law and valid, despite the invalidity by Scots law because of lack of personal denomination of the arbitrators. Furthermore the arbitrators were to apply English law.

Insofar as the common law does not apply for Canada, the civil code of the Province of Quebec provides in its Art. 8 of the



preliminary title:

Deeds are construed according to the laws of the country where they were passed, unless there is some law to the contrary, or the parties have agreed otherwise or by the nature of the deed or from other circumstances, it appears that the intention of the parties was to be governed by the law of another place; in any of which cases effect is given to such law or such intention expressed or presumed.

#### B. Nonacceptance of the Principle in the United States

In the United States the influence of the English jurisdiction did not have the effects of guiding the courts and the academic theory that one would expect. The greater number of American courts followed the rigid rule of the *lex loci contractus* -actus or solutionis- and followed with the opinion of Judge Learned Hand, formulated in *Gerli & Co., Inc. v. Cunard S.S. Ltd.*<sup>16</sup>: "People cannot, by agreement, substitute the law of another place; they may of course incorporate any provision they wish into their agreements -a statute like anything else- and when they do, courts will try to make sense out of the whole, so far as they can. But an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes."<sup>17</sup> The American academic writers continued looking to the *lex loci contractus* as to the law governing contracts and the invasion of European writers just before the outbreak of the Second World War did not have very much influence.<sup>18</sup>

Despite this non-acceptance of the well known principles from the other side of the Atlantic ocean, some authority can be found which is obviously based on Lord Mansfield's dictum.<sup>19</sup>





Chief Justice Marshall established the express choice of law rule in *Wyman v. Southard*<sup>20</sup> in a statement which has been cited in *Pritchard v. Norton*<sup>21</sup> and in *O'Toole v. Meysenburg*<sup>22</sup>: It has been said that "the situs of a contract is one of the troublesome problems of private international law, but one rule stands forth clearly: That the intention of the parties as to the law they desired to apply will govern, if such selection be made in good faith and be not opposed to the public policy of the forum".<sup>23</sup>

Despite this clear statement, the American courts are still hesitating in applying the party autonomy principle in its full extent, and the confusion has not been relieved. Even the Tentative Draft No. 6 of the Restatement 2nd<sup>24</sup> had no chance to help against the conservatism in American courts, still basing its choice of law rules on the objective connections only.

### C. The Present Day Tendency

The present day tendency flowing from the official draft of the Restatement, Second, Conflict of Laws<sup>25</sup> approaches more closely to the English and European doctrines of the proper law and of party autonomy.

As it will be seen, the proper law theory solved all the problems inherent to the rigid contracts rule. All the objective connections, the place of making the contract, the place where it is to be fulfilled, -even the scission into two parts regarding the laws to be applied-, the contact with corporeal assets and so on, all these ob-





jective connections which lead to confusion and the problems which could not be solved in a century of world trade, disappear. With the acceptance of the appropriate law, one particular system of law, easy to determine, governs all aspects of international contracts. The proper law or the appropriate law,<sup>26</sup> is the law which the parties intended to apply,<sup>27</sup> the law they may fairly be presumed to have intended to apply,<sup>28</sup> or it is the law of the country in which the contract may be regarded as localized. Localization will be indicated by the grouping of its elements as reflected in its formation and in its terms.<sup>29</sup> This localization theory examines other connecting factors than the places of making or fulfilling the contractual obligations, and it looks at expressions implied in the contract such as currency in which the debt has to be paid, the language of the text, arbitration clauses and so on and so forth.

The most recent theory abandons the localization theory and the proper law depends on two factors, namely, the intention where there is no express choice of law, and on the parties express will where there is an express choice of law by the parties.

If there is no express choice of the proper law by the parties, the judges may ask what the parties ought to have intended if they had considered the matter.<sup>30</sup> The rule stands forth clearly in *The Assunzione*,<sup>31</sup> where Singleton L.J. said:

Then the court has to determine for the parties what is the proper law which, as just and reasonable persons they ought to have intended if they have thought about the question when they made their contract. That, I believe, is the duty upon us, and in seeking to determine the question we must have regard to the terms of the contract, the situation of the parties, and generally all the surrounding facts... One must look at all the circumstances



and seek to find what just and reasonable persons ought to have intended if they had thought about the matter at the time when they made the contract. If they had thought that they were likely to have a dispute, I hope it may be said that just and reasonable persons would like the dispute determined in the most convenient way and in accordance with business efficacy.<sup>32</sup>

This is an approach to the closest and most real connection theory which was stated by Westlake as follows: "The system of law by reference to which the contract was made or that with which the transaction has the closest and most real connection...".<sup>33</sup>

However, presumptions and references to the parties constructive intentions are no longer considered and are treated as simple legal fictions. The absence of an express selection of the proper law shows that they did not think about, and to ask in such a case would be to ask a question "that admits only an artificial answer".<sup>34</sup>

The law of that legal system to which the contract has the closest and most real connection governs, if the parties did not express their will on the applicable law.

If there is an express choice of the law, there will be no doubt that this law will be the proper law of the contract. This is real autonomy, exercised by the parties.

## 2. The Autonomy Theory

For decades, autonomy, the express selection of the proper law, has been exercised and is a leading principle in the conflict of laws.



Since the leading case *Vita Food Products Inc. v. Unus Shipping Co.*<sup>35</sup> the principle has been well established by the House of Lords. Denning L. J. first hesitated in *Boissevain v. Weil*:<sup>36</sup> "Notwithstanding what was said in *Vita Food Products Inc. v. Unus Shipping Co.*, I do not believe that the parties are free to stipulate by what law the validity of their contract is to be determined. Their intention is only one of the factors to be taken into account".<sup>37</sup> He abandoned then as Lord Denning, Master of the Rolls, in *Tzortzis v. Monark Line A/B*<sup>38</sup> the localization theory and stated: "It is clear that, if there is an express clause in a contract providing what the proper law is to be, that is conclusive in the absence of some public policy to the contrary".<sup>39</sup> In the most recent case, *Miller and Partners Ltd. v. Whitworth Street Estates Ltd.* a 1970 case, Lord Reid confirmed, *obiter* because there was no express choice of the proper law in that case: "Parties are entitled to agree what is to be the proper law of their contract... There have been from time to time, suggestions that parties ought not to be so entitled, but in my view there is no doubt that they are entitled to make such an agreement, and I see no good reason why, subject it may be to some limitations, they should not be so entitled".<sup>40</sup> Dicey and Morris made the rule that says, "when the intention of the parties to a contract, as to the law governing a contract, is expressed in words, this expressed intention in general determines the proper law of the contract".<sup>41</sup>

This is also the law in Canada. Going back to 1919, in *Re Naubert*,<sup>42</sup> a life insurance contract had been made in the Province of Quebec between parties there domiciled. The money being payable by the company at its head office in Montreal, Quebec, the Quebec law





should govern. But all parties desired that the case should be decided on the law of Ontario and had signed an agreement to that effect.

Ridell J. said that "such an agreement is valid: Quilibet renuntiare potest iuri pro se introducto; and here there were no third parties whose rights were derogated from, no statutory direction violated and no public interest injuriously affected."<sup>43,44</sup>

In *George C. Anspach Co. Ltd. v. C.N.R.*<sup>45</sup> a 1950 case, Wilson J. states the principle of party autonomy, as it is well known in the English conflicts of law: "...the law, or the laws by which the parties intended... the contract to be governed... and... the proper law of the contract is the law which the parties intended to apply".<sup>46</sup> He criticizes, then, the principles contended for by Prof. Beale and quotes positively, Rabel's conflicts of laws.

In *Colmenares v. Imperial Life Assurance Co. of Canada*<sup>47</sup> Porter C.J. expressed his opinion that "...the proper law of a contract means the law or laws by which the parties intended to be governed".<sup>48</sup>

These principles are also current law in the other Provincial courts.<sup>49</sup>

Even all over the world, doctrines,<sup>50</sup> legislation,<sup>51</sup> and jurisdictions<sup>52</sup> agree unanimously, that the autonomy of the parties regarding the choice of the proper law is a leading principle in international contracts. Contracts in private international law, therefore, are governed by the law the parties intend to apply.





### 3. Connections Between the Proper Law Theory and the Autonomy Theory

Concluding this short description of the proper law theory on the one hand and the autonomy theory on the other, it is easy to see that the autonomy theory is an integral part of the proper law theory. By means of the autonomy theory, the parties through their acting according to their own will, choose the proper law governing their contracts.

Express choice of the proper law by the parties and party autonomy theory originate from the same sources.<sup>53</sup> Furthermore, they pursue the same goals, in the first place, to ascertain men's freedom in acting as a rational moral agent,<sup>54</sup> and in the second, in helping the judges as the jurisprudence shows, to solve their not always easy and simple duty, deciding problems in international contracts in a quick and decisive way.<sup>55</sup>

## II. General Acceptance of the Principle of Express Choice of Law by the Parties

The principle of autonomy in international contracts is generally accepted in private international law. Therefore, there is no need at this point for further justification, and it is only necessary to refer to the numerous authorities which support this statement.<sup>56</sup>

Hence there is some need to deal with the problem of limitations of this autonomy principle in international contracts because these limitations were subjected to a most decisive development.



### III. Limitations on the Principle of Express Choice of Law

Express choice of law by the parties is unlimited.

All trends to limit express choice of law by the parties are guided by the idea that the parties could effect an unseemly choice and that they may abuse this freedom of choice of law, like children by evasion of law or a lack of seriousness. If on this pretext, express choice of law by the parties ought to be limited, this would mean the destruction of a house because one day, a tile could fall on one's head.<sup>57</sup>

#### 1. Immanent Restrictions

Immanent restrictions<sup>58</sup> which limit the express choice of law principle by itself, do not exist. "The intention expressed in the contract... will be conclusive", said Lord Atkin<sup>59</sup> in *R. v. International Trustee*<sup>60</sup>; "...that the intention of the parties to a contract is the true criterion by which to determine by what law it is to be governed is too clear for controversy", said Lord Lindley<sup>61</sup> in *Spurrier v. La Cloche*<sup>62</sup>; "...the only question to be determined (is) the question what was the law which the parties contemplated as being the law governing the contract", said Lord Halsbury<sup>63</sup> in *The Missouri Steamship*<sup>64</sup> case.<sup>65</sup>

However, in the *Vita Food* case,<sup>66</sup> Lord Wright said that "where the English rule that intention is the test applies, and where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal and provided there is no reason for avoiding the choice on the



ground of public policy",<sup>67</sup> and it seems that he established by his dictum, some limitations.<sup>68</sup>

All these limitations mentioned by Lord Wright are not immanent restrictions of an express choice of law by the parties. They are however, restrictions belonging to the general idea of law and especially of conflicts of law; they are principles which rule over the whole system of law.

In this sense, the requirements of a *legal* choice, meaning legality on an international level,<sup>69</sup> is fulfilled if a contract enters into the international scope of law. Every express choice of law, therefore, is legal if the contract has some connections with more than one country. Notwithstanding how important this connection might be, the parties have the possibility of choosing any legal system, provided the general principles which govern the whole system of law are not disregarded.<sup>70</sup> Though, by the fact that a contract is an international contract, a choice of law will be regarded as legal.

The requirement of a *bona fide* choice might be accomplished if the parties show no *mala fides* in evading a definite legal system. However, which legal system would be evaded by choosing the law governing an international contract? There could be one, two, ten systems of law which could be evaded; none of these laws are evaded, because none of these laws can claim to govern an international contract exclusively. The international contract has links to different legal systems, it is not part of one particular system of law and therefore no particular



legal system is evaded, with the exception that the contract must have a foreign element, which corresponds with the *legality* requirement.<sup>71</sup> If the express choice of law principle is accepted in private international law and the parties effect an express choice, there is no more question about the law with the most substantial and the close connection. If this principle is accepted, all legal systems stand on the same level and have therefore, the same right and the same pretension to be evaded. One cannot say that this legal system is more evaded than another one, and therefore the imperative rules of the first system, and the first one only have to be applied as a whole.

## 2. General Clauses

The principle of *public policy* of course is the most important restriction on the express choice of law by the parties. Hence it is not a limitation immanent in this autonomy principle, but it is, furthermore, a general principle of law, and especially of conflict of laws.

It will just be mentioned that there is no reported case in Canada nor in England in which there was no effect given to an express choice of law by the parties.<sup>72</sup>

But however, there is a recent Australian case, *Golden Acres Ltd.v. Queensland Estates Pty. Ltd.*<sup>73</sup> Freehold Land Investments Ltd., a Hong Kong company, carrying on business in the sale of land in Queensland, could not recover its commission because it was not licensed as required by a Queensland Statute and because the agreed commission exceeded the maximum rate laid down in this Statute. The





contract had a provision that for all purposes arising under this agreement, the same shall be deemed to be entered into in the Colony of Hong Kong.

Hoare J. opined that the selection of a law other than the law of Queensland was made for the specific purpose of avoiding the consequences of illegality which would or might have followed if the Queensland law applied.<sup>74</sup> His Honour concluded that the purported selection of Hong Kong law was not a *bona fide* selection.<sup>75</sup>

Kelly<sup>76</sup> approved the result of the reasoning as *hardly questionable* but expressed the opinion that the case could have been decided on the ground of *public policy*, e.g. incompatibility with a statute of the forum.<sup>77</sup>

### 3. The American Doctrine

A somewhat different view has been taken by the American courts and the American doctrine. Finally, the Restatement, Second, Conflict of Laws<sup>78</sup> as adopted by the American Law Institute in 1969, determines in its Chapter 8, S. 187, that, for contracts, the law of the State chosen by the parties should govern.<sup>79</sup> Subsection one deals with, as it is called in this thesis, the incorporation of foreign law theory,<sup>80</sup> while subsection two permits the parties to choose the applicable law in interstate conflicts.

The Restatement, Second, states two limitations to the express choice of law by the parties. The first one is the requirement of a reasonable basis for the parties' choice,<sup>81</sup> and the second limita-



tion is the denial of recognition to a choice of law if the application of the chosen law would be contrary to the fundamental policy of an otherwise applicable law.<sup>82</sup>

The requirement of a 'reasonable choice' is accomplished when the choice of law was not made in the spirit of adventure or to provide mental exercise for the judge-situations which do not arise in practice,<sup>83</sup> where there is a substantial connection or relationship, or when there is a demand for certainty, predictability or convenience, these being goals of primary order in private international law.

The requirement of a 'reasonable choice' seems to be unnecessary, because the content of such a limitation could be so widely circumscribed that it would be of no value anymore. The exigency of internationality is sufficiently restrictive and could cover it entirely.<sup>84</sup>

The limitation, as it is stated in the Restatement, Second, that no choice of law can be effected if it would be contrary to the fundamental policy of the State of the applicable law in the absence of an effective choice, namely the state with the most real and substantial connection, is a typical 'interstate policy' problem, arising out of the usury and insurance cases. The transfer of this American State interest policy "in the scope of international commerce cannot be admitted and would be disastrous".<sup>85</sup>

However, the Restatement, Second, makes an express reference to the local law of the chosen state, omitting any eventual question of a '*renvoi*' or '*transmission*'.<sup>86</sup>



#### IV. Conclusion

The autonomy theory is that part of the proper law doctrine by which the parties are permitted to choose the applicable law for their international contracts by their own will. This express choice is decisive. The possibility of choosing the applicable law is not limited, provided the contract is an international contract. A contract becomes international by having connections with more than one particular legal system.

The requirement of internationality is only the logical answer to the conflict question. It seems an obvious and logical consequence, that first of all, the conflicts question has to be considered when a conflicts case is dealt with, and this conflicts question can only be considered within an international case. Whether the case fulfills the requirement of internationality or, in other words, whether its connection with a foreign legal system would be sufficiently intensive, is not yet answered.

In a classic, properly national case, as it is dealt with in 44 RGZ 300, the conflicts question is not considered. In this case, a Dresden domiciled Saxon claimed the services of a Leipzig(Saxony) domiciled matchmaker, referring to Prussian law, which, in contrast to the Saxon, considered valid the promise of award given to the matchmaker. The German Reichsgericht nullified the stipulation of choice of law, basing its judgment on the fact that personally and substantially, the transaction belonged solely to one jurisdiction, lacking all and any foreign elements.<sup>87</sup> The stipulation of a foreign law alone does not make an international case out of a national one. The complete transaction took



place within one system of law. However, the question of the applicable law has to be considered, and it is not the applicable law regarding the '*locus*' which is in question, but merely the applicable law regarding the '*tempus*'. It cannot be in the parties' discretion to make a purely national case, without any spatial or personal connections abroad into an international case merely by a substantial interest in the application of the stipulated law.<sup>88</sup>

It would be too easy for the parties to create an international out of a pure national legal relation, merely by a change of the connecting factors beyond the limits of the '*as-such-applicable*' law. Therefore, a stipulation of a foreign law in an internal contract, would not be permissible, in the same manner as the change of the connections merely by posting a letter of acceptance on the other side of the border or by establishing a fictitious place of business abroad, would be forbidden.

However, the French cour de cassation<sup>89</sup> defended the choice of the English law by applying a formula of the London Corn Trade Association to a contract between a French merchant and a French company, which had to be performed in a French harbour. The fact that the goods were coming from abroad and had to be paid by cheque in London, and furthermore, that the headquarters of the French company was in the Netherlands, although the company had its '*siège sociale*' in Strasbourg (France), and that the parties submitted themselves to a London arbitrator, the contract became an international contract and "(met) en jeu des intérêts de commerce international".<sup>90</sup>





Evidence for the internationality of a contract has been established by the Cour d'Appel de Paris.<sup>91</sup> The international character of a contract is to be considered if the place of contracting is abroad, if the parties have a different nationality and the purpose of the contract would consist in displacing goods over the borders. In such a case, the parties would have the possibility of choosing freely a particular system of law.

In the literature, the question of internationality has not been answered positively. The 1956 Hague Conference which dealt with the problem of internationality, confined only negatively the requirement of internationality in its Art. 1 al. 4: "la seule déclaration d'un juge ou d'un arbitre ne suffit pas à donner à la vente le caractère international au sens de l'alinéa 1er du présent article".<sup>92</sup> This negative definition bears no solution because in the common law countries, an arbitration clause is regarded as an objective connection.<sup>93</sup>

The decision of the French court<sup>94</sup> may be a guideline in answering the question whether the contract has entered in the international scope or whether it remains a pure internal contract. The criterion of an objective connection to more than one legal system will be decisive as to the question of internationality, whereas a restriction however, of the free choice of law between the laws which have an objective connection, only would be too narrow-minded. This is incompatible with the ideas of "helping to produce that 'swift and certain rule' so important for merchants".<sup>95</sup> An example would be the difficulties regarding the law governing '*contrats de suite*'. Often Argentine farmers cannot



establish a substantial connection to the law of England provided by the formula set by the London Corn Trade Association.

As long as an objective connection to at least one foreign legal system exists, the contract has to be classified as an international contract. The question whether a specific connection is objective or not has to be decided by our judges and this task is not too difficult, because the judicial decisions have shown that the merchants are not as malicious as academic writers and judges would like to have them. And even if on an isolated occasion, an experienced party may abuse its freedom of choice and choose an unseemly legal system, which cannot be helped with the requirement of internationality, then it should be accepted and the conflict of laws gourmet should find consolation in consuming this new delicacy.<sup>96</sup>

However, an English court had no difficulty in enforcing a choice of law clause in a contract made in New York between a Citizen of Ecuador and a Canadian company, respecting certain mineral rights in Ecuador: "While for convenience this agreement is signed by the parties in New York, United States, it shall be considered and held to be one duly made and executed in London, England."<sup>97</sup>

Therefore, it can only negatively be said that the requirement of internationality is not satisfied when a "contract by 'all' (not only by some) substantial connections belongs to one sole jurisdiction, and this, is devoid of 'all' considerable foreign elements."<sup>98</sup>



V. Footnotes to Chapter Three, First Subtitle

1. [1961] A.C. 727 and see *Re Levick's Will Trust* [1936] 1 W.L.R. 311.
2. See Anton 184.
3. *Re Pilkington's Will Trust* [1937] Ch. 574.  
*Dickson on Evidence*, S.1014.
4. *Fourbet v. Turst*, (1703) 1 Brown Parl. Cas. 129.
5. *Id.* at 130/131.
6. See Dicey-Kahn-Freund, *Conflict of Laws*, (6th ed.) 597.
7. *Connor v. The Earl of Bellamont* (1742) 2 Atk. 382
8. (1742) Mor. 4512
9. See Guthrie's *Savigny Translation*, 513, referring to *Praelectiones Iuris Romani et Hodierni*, Part II, Book 1 Title iii, Subtitles 10, 34.
10. (1760) 1 W.Bl. 257.
11. *Supra* n. 8.
12. *Id.* at 258/259.
13. [1894] A.C. 202; however, Graupner, *Contractual Stipulation Conferring Exclusive Jurisdiction upon Foreign Courts in the Law of England and Scotland* (1943) 59 L.Q.R. 227, 228 goes back as far as 1796 to the *Gienar v. Meyer* case (1796) 2-Bl. 603 and Graveson 430 goes as far as to *Santos v. Illidge* (1860) 8 C.B. (W.S.) 861.
14. At 215.
15. At 208.
16. (C.C.A. 2nd 1931); 48F. (2nd) 115.
17. *Id.* at 117.
18. For detailed analysis see Yntema, "Autonomy" in *Choice of Law in the United States*, (1955) 1 N.Y.L. Forum 46; Reese *Contracts and the Restatement of Conflict of Laws*, Second, (1960) 9 I.C.L.Q. 531 et seq.
19. *Supra* 33 n.9.
20. US 1825, 10 Wheat.1.



21. 106 U.S. 124 (1882).
22. (C.C.A. 8th 1918) 251 Fed. 191.
23. *Id.* at 194.
24. S. 332a of the Tentative Draft No. 6.
25. *Restatement, Second, Conflict of Laws*; proposed official draft (1968), S.188.
26. Anton 185.
27. *Vita Food Products Inc. v. Unus Shipping Co.*, [1939] A.C. 277
28. *Lloyd v. Guibert* (1865) L.R. I.Q.B. 115 at 120.
29. *Jones v. Metropolitan Life Insurance Co.*, 286 N.Y. Suppl. 4 (1936). *The Serbian and Brazilian Loans*, P.C.I.J. [1929] Series A, Nos. 20 and 21.
30. *Bonython v. Commonwealth of Australia* [1951] A.C. 201  
*Re United Railways of Havana and Regla Warehouses, Ltd.*,  
 [1960] Ch. 52 at 91/92, 115 *aff'd*, sub nom. *Tomkinson v. First Pennsylvania Banking & Trust Co.* [1961] A.C. 1007, at 1068, 1081/1082.
31. *The Assunzione* [1954] P. 150;
32. [1954] P. 150, at 175, 179; [1954] 1 All E.R. 278, at 289, 292.
33. *Bonython v. Commonwealth of Australia*, [1951] A.C. 201, at 219.
34. *Tomkinson v. First Pennsylvania Banking & Trust Co.*, [1961] A.C. 1007.
35. *Vita Food Products Inc. v. Unus Shipping Co.* [1939] A.C. 277.
36. *Boissevain v. Weil*, [1949] 1 K.B. 482.
37. *Id.* at 490/491.
38. *Tzortzis v. Monark Line A/B*, [1968] 1 W.L.R. 406.
39. *Id.* at 411.
40. *Miller and Partners Ltd. v. Whitworth Street Estates Ltd.* [1970] A.C. 583, at 603.
41. Rule 127, sub-rule 1, at 697.





42. (1919) 17 O.W.N. 120.
43. *Id.* at 121.
44. In (1919) 46 O.L.R. 210 some authorities for this opinion are introduced:  
*Brunsdon v. Allard* (1859) 2 E.& E. 19.  
*Slater v. Sunderland Corporation* (1863) 33 L.J.Q.B. 37.  
*R. v. Inhabitants of Birmingham* (1843) 5 Q.B. 210.  
*Habergham v. Vincent* (1793) 2 Ves.Jr. 204, 227.  
*Crocker v. Marquis of Hertford* (1844) 4 More P.C. 339.
45. [1950] O.R. 317.
46. *Id.* at 327.
47. 54 D.L.R. (2nd) 386.
48. *Id.* at 397/398.
49. for Manitoba:  
*Traders Finance Corporation v. Casselman* (1957) 22 W.L.R. 625 at 631; *Trans Canada Credit Corp. Ltd. v. Prince* (1965) 52 W.W.R. 440 at 447;  
 for British Columbia:  
*Sharn Importing Ltd. v. Babchuk* [1971] 4 W.W.R. 517 at 522/523;  
 for Alberta:  
 see: Raise of a loan by the City of Edmonton in Switzerland. For all duties flowing out of these contracts, the Swiss law has been chosen in the conditions Art. 13. The City has for this special purpose a domicile in the Canadian Embassy in Berne.  
 But despite of this chosen domicile, the bondholders can sue the City in Alberta courts; still Swiss law is applicable.  
 Translated from *Neue Zuercher Zeitung* (Zurich Journal), Wednesday, October 11th, 1972, Morgenausgabe Nr. 474.
50. Rabel 351, *et seq.*; *Seventh Hague Conference on Private International Law*, Draft Convention of the Law Applicable to International Sales of Goods, 1951, Art. 2-4, Text in (1952) 1 Am. J. Comp. L. 275; Gutzwiller, *Beitraege zum Haager International privatrecht*, 1951, 38; Wolff, *Some observations on the Autonomy of contracting Parties in the Conflict of Laws*, (1950) Trans. Grotius Society 143; Unger, *Life Insurance in the Conflict of Laws*, (1964) 13 I.C.L.Q. 482.
51. Austria: ABGB von 1811, Artt. 36, 37.  
 Belgium, Luxemburg, Netherlands: Loi uniforme relative au droit international privé, 1951, Art. 5.  
 Brasil: Codigo Civil Brasileiro, 1916, Art. 13.  
 China: Règlement sur l'application des lois, 1918, Artt. 23, 26.



Czechoslovakia: Law of March 11, 1948, relative to private international and interlocal law and the legal positions of aliens within the sphere of private law, Art.9.  
 Greece: Code Civil 1940, Art. 25.  
 Italy: Codice Civile, Disposizioni preliminari, Art. 25.  
 Japan: Law concerning the Application of Laws in General, Law No. 10, June 21, 1898, as amended by Law No. 7 of 1942 and Law No. 223 of 1947, Art. 7.  
 Mexico: Codice Civil 1928, Art. 15.  
 Convention on Private International Law (Codigo Bustamante) signed at Havana 1928, Artt. 3, 184, 190.  
 Portugal: Codice Comercial Portugues, 1888, Art. 4.  
 Quebec: Code Civil, 1866, Art. 8.  
 Second South-American Congress on Private International Law of Montevideo 1940, Protocolo adicional, Art. 5.

52. Belgium: see Van Hecke, (1955) Rev. dr.i.c.81 et seq.  
 France: Batiffol 625.  
 Germany: Gamillscheg, *Rechtswahl, Schwerpunkt und mutmasslicher Parteiwille im internationalen Vertragsrecht*, (1958/59) 157 Archiv fuer civilistische Praxis 303 at 304 n.6 and 7.  
 Great Britain: Cheshire-North 205.  
 Scandinavia: Lando, *Scandinavian Conflict of Law Rules Respecting Contracts*, (1957) 6 Am.J.Comp.L. 1 et seq.  
 Hambro, *Autonomy in the International Contract Law of the Nordic States*, (1957) 76 I.C.L.Q. 589 et seq.  
 United States: Editor's note in (1951) 51 Column. L. Rev. 553, 556.
53. *Supra* 16 et seq.
54. *Supra* 5.
55. *Supra* 20.
56. *Supra* 32 et seq.
57. This example is by F. Gamillscheg, *Rechtswahl, Schwerpunkt und mutmasslicher Parteiwille im internationalen Vertragsrecht*, (1958/59) 157 Archiv fuer civilistische Praxis, 303 at 308.
58. As immanent restrictions are regarded the limitation that only a choice between the *lex loci actus* and the *lex loci solutionis* or between the laws of the parties domicile could be possible.
59. [1937] A.C. 500 at 529.
60. [1937] A.C. 500.
61. [1902] A.C. 446 at 450.



62. (1902) A.C. 446.
63. *In Re Missouri Steamship Co.* (1889) 42 Ch. D. 321. at 336
64. (1889) 42 Ch. D. 321.
65. Examples by Wolff 418.
66. (1939) A.C. 277; (1939) I All E.R. 513.
67. (1939) A.C. 290.
68. These limitations had not met with universal approval: cf. Morris and Cheshire, *The Proper Law of a Contract in the Conflict of Laws*, (1940) 56 L.Q.R. 320; per Lord Denning in *Boissevain v. Weil* [1949] I K.B. 482 at 491; per Kitto J. in *Kay's Leasing Corporation v. Fletcher* (1964) 116 C.L.R. 124 at 143; but cf. per Lord Denning M.R. in *Tomkinson v. First Pennsylvania Banking & Trust Co.* [1961] A.C. 1007 at 1068; *Tzortzis v. Monark Lines A/B* [1968] I W.L.R. 406 at 411.
69. Legality on an international level will not touch the problems of creation of a contract, etc. as it does legality on an internal level. International legality is concerned with a more generous compliance of forms on a level of equal systems of law.
70. *Infra* 44.
71. *Supra* 43.
72. See Morris 231.
73. [1969] Qd. R. 378.
74. *Id.* at 384.
75. *Id.* at 385.
76. In *International Contracts and Party Autonomy*, (1970) 19 I.C.L.Q. 701.
77. *Id.* at 702-704.
78. *Restatement, Second, Conflict of Laws*, S. 1-221, St. Paul, Minn. 1971.
79. 187. Law of the State Chosen by the Parties.  
(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issues is one which the parties could have resolved by an explicit provision in their agreement



directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue unless either:

(a) the chosen state had no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or;

(b) application of the law of the chosen state would be contrary to a fundamental policy of the state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of para. 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

80. *Supra* 18.
81. 187 subsection 2, lit. a.
82. 187 subsection 2, lit. b.
83. *Restatement, Second, Conflict of Laws*, comment 567.
84. *Duskin v. Pennsylvania-Central Airlines Corporation* 167 F.2d 727 (1948) where the court applied local Pennsylvania law, which was chosen in a pilot's employment contract made elsewhere by non-residents.
85. 2 Rabel 429.
86. 187 subsection 3.
87. *See* 2 Rabel 402.
88. *See Gamillscheg, Rechtswahl, Schwerpunkt und mutmasslicher Parteiville im internationalen Vertragsrecht*, (1958/59) 157 Archiv fuer civilistische Praxis 313.
89. *Arret de la Cour de Cassation*, 19 fevrier 1930; (1932) 59 *Clunet*, *Journal de droit international* 90.
90. *Id.* at 92.
91. *Arret de la Cour d'Appel de Paris*, 19 Juin 1970; (1971) 60 *R.crit.d.i.p.* 692. The parties of an agency contract which had connections with France and the Netherlands could exclude the application of French law.
92. *Actes et documents* 225.





- 94. *Supra* 48.
- 95. 2 Rabel 431.
- 96. Gamillscheg, *op. cit.* 308.
- 97. *British Controlled Oilfields v. Stagg* (1921) 66 Sol.J. 18.
- 98. 2 Rabel 430.



## Second Subtitle: TORTS

Foreign trade and business with foreign countries are increasing rapidly, people are working often abroad or for foreign companies, international transports are effectuated daily in great numbers, people are travelling abroad for holidays by plane, cars, ships and railways; life is internationalized.

More and more torts are committed, which are related to several legal systems through the parties themselves<sup>1</sup>, the way of committing<sup>2</sup> or the effects of the committed tort.<sup>3</sup>

The cases become more complex and it seems that there are good reasons that the governing principle '*when in Rome do as the Romans do*' is not valuable in its full extent any more.

In the first section it will be shown that the possible solutions offered by the common principles are unsatisfactory. In the second paragraph then, it will be proved that there is need for a 'proper law of the tort' including the parties express choice of the governing system of law. In the last paragraph a short conclusion will follow the foregoing reasoning in the first and the second part.



## I. Unsatisfactory Solution of the Governing Principles

Whenever a court has to sit and to decide on tortious facts, which have been committed abroad, it falls to be determined which system of law is to be applicable to govern the duties and the rights arising out of such an international tort. Three possible solutions have been proposed and they seem to be well established. The first of them is the '*lex loci delicti commissi*', the law of the place where the wrong has been done, the second is the '*lex fori*', the law of the forum where the action was brought forth, and the third is an alternative or a cumulative application of both of these principles.

### 1. The Crisis of the '*lex loci delicti commissi*'

The '*lex loci delicti*' principle is one of the oldest principles in the conflict of laws and looks back to the old traditions at the beginning of the 13th century, founded by the '*statutists*' in the upper Italian cities.<sup>4</sup> It is a function of the '*locus regit actum*' principle, referring all problems in conflict of laws concerning rights and duties to their origin, where they were made.

However, like the principle of the '*lex loci actus*', the law of the place where a contract was made,<sup>5</sup> the '*lex loci delicti commissi*' bears the same difficulties as the contracts conflict rule based on the place of action, namely where the exact place of the wrong will be. The difficulties of classifying the place of wrong, and above all, because it has not been classified everywhere in the same manner, the '*lex loci delicti commissi*' is a most questionable principle.<sup>6</sup>



### A. The Place of Wrong as the Place of Injury

In some legal systems, the '*locus delicti*', the place of the wrong is that place where "the last event necessary to make an actor liable for an alleged tort takes place"<sup>7</sup> and more clearly, "the place where the injury occurred"<sup>8</sup>. This principle, applied in an illustration by Rabel<sup>9</sup>, would make the law of the state Z applicable in a case where A might mail in X a letter containing defamatory statements about B, a Y resident, to C, a resident in state Z.

This idea, that the place of injury should govern a tort is clearly based on the ideas that a tort, like a crime, is only committed if an injury occurs and that therefore the tort is localized where this last event<sup>10</sup> necessary to finish the tortious act, like a finishing touch, occurs. Only through this last event does a cause of action arise and the injured person acquires, at this place and at this very moment of injury, an indefeasible right for damages.<sup>11</sup>

This was the prevailing American Theory<sup>12</sup> and the reasons why it has been abandoned are quite clear.<sup>13</sup>

### B. The Place of Wrong as the Place of Acting

In other legal systems, the '*locus delicti*', the place of the wrong is the place where the tortious wrongdoer acted partially or wholly. In the example above<sup>14</sup> it would be the state X, where the defamatory letter was mailed.

The arguments pleaded in favor of this principle are





merely the facts that an actor, by applying the laws of the place of action, can count upon these laws and therefore can arrange his conduct according to these laws. And, furthermore, the laws, regulating human behavior and punishing wrongdoers, are more concerned with the acts than with the effects (so also the criminal law). The greater part of the civil law countries<sup>15</sup> define the '*lex loci delicti*' as the law of the place of acting.

### C. Concurrence and Alternative Application of the Laws of the Place of Acting and of the Place of Injury

Because both of the above mentioned characterizations of the '*lex loci delicti*' are problematic, the place of acting rule favouring the wrongdoer and the place of injury rule the injured, in an issue which should, however, be an equal and just arrangement of interests, the German Reichsgericht<sup>16</sup> and the Swiss Federal Tribunal<sup>17</sup> developed an alternative application of the two principles.

Both acts and effects are equal parts of a tort, and 'no tort without tortious act and no tort without injury' is a well known maxim, and it seems therefore, to be quite clear, that in the conflict of laws the injured person, the disadvantaged person, can choose one single or combined application of laws of the place of action and the laws of the place where the injury occurred.

In this sense, however, the law of the place of acting would favour the actor and it is possible that at this place the act he has done is not wrongful but at the place of the injury, it is cause



for an action to recover damages. On the other hand, the law of the place where the injury occurred would preserve the injured person according to his own social environment, he will be protected by his own laws and can protect himself within the possibilities offered by his own laws.

However, the laws of the place of action could be more favorable for the injured, therefore it would be just and fair that he can choose the law which favors him as an injured person.<sup>18</sup>

#### D. Inferences

The application of the '*lex loci delicti commissi*' in so many different ways, and it would be easy to add other specified characterizations of the '*lex loci*' rule<sup>19</sup>, creates an uncertainty within this rigid rule. The application of the laws of the place of injury on the one hand and the law of the place of the actions on the other hand to solve the conflicts problem of a specific case could lead to the possible application of two different laws.<sup>20</sup> Which one of these two laws has a right to govern the case in question? None of them, because both of them represent two equal parts of the wrong, namely the action on the one hand and the injury on the other hand. This is the crisis within which the '*lex loci delicti commissi*' finds itself.

The crisis of the rule in its environment is shown by the facts that the '*locus delicti*' more and more represents a factor of a minor importance as to the whole tort situation. The 'territorial sovereignty' over a tort in today's system of the conflict of laws no longer claims power to govern obligations merely because they were



born within the territory in question. Furthermore, the rule does not pursue the postulate of justice in the conflict of laws in the cases where no social relationship to the place of the wrong ever existed.

The '*locus delicti*' in the complexity of today's internationality, is often accidental and does not justify the application of the '*lex loci delicti*'. In this sense transport accidents, which are by far the majority of tort cases which occur today, may happen in a country to which none of the parties involved have a connection, except that the accident happened there. An aircraft may be hijacked on a flight from New York to Mexico and crashed in the Canadian Rockies; a motor accident may occur in Portugal, involving an American and a Canadian, the one with Italian, the other with German international immatriculation plates on their cars, because they bought their cars duty free in Italy and Germany.<sup>21</sup>

The application of the '*lex loci delicti*' is even less justified, when parties are involved in a tort case, who have some kind of a relationship to each other. This relationship could be the same domicile or residence<sup>22</sup> or the infamous driver and his guest<sup>23</sup> and other special relations like common employment<sup>24</sup> and common excursions.<sup>25</sup>

All these examples show that a rigid rule, and that is what the '*lex loci delicti commissi*' represents, would cause more injustice than would be desirable for the security of the law. Territorial sovereignty which is represented by the exclusive application of the '*lex loci delicti*' in international torts, is in today's tendency of internationalizing the social environment impossible and would, in





regard to conflicts, be a reversion to 18th and 19th century principles.

## 2. The Crisis of the 'lex fori'

Another solution to solve the choice of law problems in tort cases is to apply the 'lex fori' as the law of the place where the action was brought, regardless of the international connection the case in question might have. The 'lex fori' rule which has been abandoned centuries ago in the domain of contract, marriage and divorce, property and wills, is nevertheless still a prevailing rule moving like a ghost through the international law of torts.

### A. Basics and Origin of the 'lex fori' Principle

The articles and books written by the German author Carl Friederich von Savigny<sup>26</sup>, which were based on ideas of Carl Georg von Waechter<sup>27</sup> had a great influence not in fact in their own country but more so abroad and especially in the courts of England. The decision of the Privy Council in *The Halley*,<sup>28</sup> sitting as a court of appeal from the Court of Admiralty, was obviously the basis for the foundation of the *lex fori* rule in England and in the British Commonwealth. In this case it was held that a British ship owner was not liable for the consequences of a collision between his ship and a Norwegian vessel in Belgian territorial waters. The collision was the result of a negligent act of a Belgian pilot. According to the laws of Belgium, the ship owner is liable for any act the pilot was doing, even if he is a compulsory pilot, as in this case; but according to the English law he was not liable. English law was applied as the law of the forum where the action was brought. The underlying basis for the decision was that the court disliked the idea that a ship owner (a





British ship owner?) should be liable for a pilot whom he had not chosen and over whom he had no control.<sup>29</sup>

The application of the '*lex fori*' alone and as an exclusive test in torts cases has been overruled in *Phillips v. Eyre*<sup>30</sup> where Cockburn C.J. said that the '*lex fori*' rule would lead to "the most inconvenient and startling consequences".<sup>31</sup> Since this decision was made, the '*lex fori*' rule is still the major rule to be applied in a tort case, but its hegemony is broken.<sup>32</sup> It is however, still a primary basis for decisions in the United Kingdom and the Commonwealth,<sup>33</sup> because only a tort case, which is actionable according to the '*lex fori*' can be brought before English and Commonwealth courts. Thus, the '*lex fori*' still plays the dominant role.

#### B. Reasons in Favour of the Application of the '*lex fori*'

The reasons brought forth in favour of the '*lex fori*' are not sound. The links of the law of the forum with the criminal law is one of the historical roots of the '*lex fori*' rule in conflicts, but the thinking of C.G.v. Waechter was directed to situations which have no relations to today's torts situations. He was fixed in events like duels and provocation from France over the river Rhine to Germany, and at this time, very few international relations were established.<sup>34</sup> The close connection between the liability for crimes and the liability for civil torts has been asserted in the Court of Appeal decision of the *Machado v. Fontes* case.<sup>35</sup> Not only the ideas of a connection between the criminal law of a single jurisdiction and an international



tort, problems which cannot be dealt with at this point, but also the whole attitude towards the general purpose of the law of torts has changed. This general attitude is that it is not a civil punishment any more. One learned writer<sup>36</sup> has said "the law of torts is to secure a man's indemnity against certain forms of harm, not because they are wrong, but because they are harms" is not a valid statement any more. It became more an adjustment of economic and social interests than a punishment and an "instrument of distributive rather than of retributive justice".<sup>37</sup>

It has often been said that the rules of torts are mandatory, that they are *ius cogens* and that they have, therefore, the exclusive power to govern a case in torts which has been brought before the forum in question. A primary objection to this statement is that the law of torts neither in internal nor in international law is absolutely mandatory. Persons, entering into a voluntary relationship quite frequently make agreements considering the assumption of risks or exemption clauses to what would usually be a breach of duty; and furthermore these agreements are not contrary to public policy.<sup>38</sup> Even if it were against 'internal public policy' it is a commonplace that it would not be consequently against public policy on an international plane. It may be necessary sometimes to deny a foreign tort claim because its enforcement would be contrary to the public policy of the forum, but to make a rigid rule out of an exemption, merely because foreign law could differ from the '*lex fori*', would be narrow-minded. "We are not so provincial as to say that every solution of a problem is wrong, because we deal with it otherwise at home", said Cardozo J. in *Loucks v. Standard Oil Co. of New York*.<sup>39</sup>



A third argument in favor of the application of the '*lex fori*' is that the '*lex fori*' is the only constant connecting factor between all the others 'accidental' and 'fortuitious' and 'arbitrary' connecting factors, the ambiguity of the '*lex loci delicti commissi*' included.<sup>40</sup> The fact that a rigid rule cannot satisfy the requirements of a conflict rule for torts in the complexity of today's world will be proven later.<sup>41</sup>

The difficulty of proving foreign law before the courts is nowadays no reason of value in favor of an exclusive application of the '*lex fori*', since information and experts in foreign law are at hand.<sup>42</sup> Another problem, which will only be mentioned here, is that "an English court has jurisdiction to award damages for any tort, which is actionable according to English law, and for no other tort".<sup>43</sup>

It is, however, not a test of jurisdiction, as stated by Lord Wilberforce in *Chaplin v. Boys*<sup>44</sup>: "I accept what I believe to be the orthodox judicial view that the first part of the rule is laying down, not a test of jurisdiction, but what we now call a rule of choice of law; is saying, in effect, that actions on foreign torts are brought in English courts in accordance with English law".

This opinion is well established in the Canadian Courts also.<sup>45</sup>

### C. Reasons Against the Application of the '*lex fori*'

One of the weightiest attacks against the '*lex fori*'





as the applicable law, if it is not the unfitness of a rigid rule, is that the application of the '*lex fori*' opens the door to an easy 'forum shopping'. It seems to be quite easy to find some connection to establish the jurisdiction of a suitable forum "where the law was more favorable...than in the place of the wrong, provided that...the defendant happened to be present".<sup>46</sup> A striking example of a case of forum shopping is *Lieff v. Palmer*<sup>47</sup> a case decided by the Quebec Queens Bench Court. In this case, an action was brought in Quebec by a domiciled Ontarian for damages caused by a car accident in Ontario, while he was a gratuitous passenger in the car of an Ontario domiciled driver. The action was brought while the defendant stayed in Hull, Que. "En principe, les tribunaux d'un pays sont incompétents pour juger un proces entre étrangers; mais cette incompétence n'est ni absolue ni d'ordre public; et c'est ainsi, par le procédé qu'elle (the plaintiff) a employé, que la demanderesse a pu soumettre son litige a nos tribunaux", was the opinion of Rivard.<sup>48</sup>

### 3. The Double Rule

Since the famous double rule laid down by Mr. Justice Willes in 1870 in *Phillips v. Eyre*<sup>49</sup> the English and the Commonwealth courts follow the test of a combination of the '*lex fori*' and the '*lex loci delicti commissi*': "First, the wrong must be of such a character that it would have been actionable if committed in England....secondly, the act must not have been justifiable by the law of the place where it was done".<sup>50</sup>

Throughout the hundred years of the application of that rule, it has been severely criticized.<sup>51</sup> This after all, is not sur-





prising considering the crises in which the '*lex fori*' and the '*lex loci delicti commissi*' find themselves.<sup>52</sup> It is not appropriate to criticize the rule at this place, and the Canadian application thereof<sup>53</sup> in the more recent cases.<sup>54</sup> The Canadian decisions, in some sense sailing a wind coming from the south, the United States,<sup>55</sup> showed some effort towards an application of a new approach to torts problems. The higher courts in the provinces and the Supreme Court of Canada however, still feel bound by the rule in *Phillips v. Eyre*<sup>56</sup> and recently by *Chaplin v. Boys*.<sup>57,58</sup> This tendency towards another, more flexible approach to the torts problems in conflict of laws and the knowledge that only one general rule governing all kind of foreign torts is unsatisfactory showed clearly that it is no longer possible to solve these problems with the double rule.

## II. The Proper Law of the Tort

In the first part of this subtitle it has been explained that the governing principles in torts are not satisfactory. The rules which apply, the '*lex loci delicti*' as well as the '*lex fori*', cannot render justice to the complexity of the cases today, nor can an alternative or a cumulative application of both these principles.

Because these principles are unsatisfactory, a new approach has to be found in this second part of the subtitle. This new approach is well known as the 'proper law of the tort'. It is not appropriate to deal with the proper law theory in extenso at this point, but merely to show some advantages and disadvantages of the rules and, furthermore, to follow the idea of a proper law of the tort to an end.



This end, logically deduced from the proper law theory, will be found in the application of the law expressly chosen by the parties.

Some conclusions will follow in the third part of this subtitle.

### 1. The New Approach

It is obvious, and the recent cases<sup>59</sup> have proven that the old concepts have to be re-examined. The modern way of living, doing business and the modern technology are only part of all the factors which increased the volume of cases on international tort liability. A new approach has to be found, an approach which leads to just results taking into consideration all circumstances, not only the places of actions (the place of the wrong as well as the place of the claim), but also the social environment, the social factors of the tort in general.<sup>60</sup>

The '*lex loci delicti commissi*' as a general rule has therefore been rejected.<sup>61</sup>

The new approach has been found in the famous expression 'the proper law of the tort'.<sup>62</sup> A proper law approach in this sense would furnish a flexible rule, able to render adequate decisions to the most different tort problems. The factors of a tort, which should be taken into account to determine the '*lex causae*' are in this idea, the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, nationality, or place of incorporation and place of business of the parties, and the place where the relationship, if any, between the parties is centered.<sup>63</sup>



Still the '*lex loci delicti commissi*' seems to be the prevailing rule. The only reason for its first place would be the fear that the judges and the greater number of lawyers are not shocked, because they still base their ideas of conflict of laws on the old '*lex loci delicti*' rule.

In the meantime, the Conference of Commissioners on Uniformity of Legislation in Canada prepared a Tentative First Draft of a Foreign Torts Act <sup>64</sup>:

1. "When deciding the rights and liabilities of the parties to an action in tort, the court shall apply the local law of the state which has the most substantial connection with the occurrence and with the parties regardless of whether or not the wrong is of such a character that it would have been actionable if committed in this Province.
2. "When determining whether a particular state has a substantial connection with the occurrence and the parties, the court shall consider the following important contacts:
  - (a) the place where the injury occurred;
  - (b) the place where the conduct occurred;
  - (c) the domicile and place of business of the parties; and
  - (d) the place where the relationship, if any, between the parties is centered.
3. "When deciding which state, among the states having any contacts within Section 2, has the most substantial connection with the occurrence and the parties, the court shall consider chiefly the purpose and policy of each of the rules of local law that is proposed to be applied."<sup>65</sup>

This First Draft is obviously based on the Restatement of the Conflict of Laws, Second, prepared by the American Law Institute, and does not accept the common residence of the parties involved.

The recent development however, is laid down in a more liberal and happier proposition, prepared by the Quebec Office of



## Revision of the Civil Code:

Extracontractual civil liability is governed by the law of the domicile (habitual residence) of the plaintiff at the time when the act which caused the damage occurred. However, the defendant may raise a defense based on the lawfulness of the act which caused the damage and the absence of an obligation to repair it according to the law of the place where this act occurred.<sup>66</sup>

Unfortunately, a most questionable proposal was made by the Hague Convention on the Law applicable to Traffic Accidents of October 1968,<sup>67</sup> still applying the '*lex loci delicti commissi*' as the major rule. In its Art. 3 it says: "The applicable law is the internal law of the state where the accident occurred".

The following Art. 4 and Art. 5 state only certain exceptions to this basic rule.

On the other hand, the Swiss Federal Road Traffic Code of 1958<sup>68</sup> provides that the Swiss judge applies Swiss law to claims arising from accidents outside Switzerland caused by motor vehicles or bicycles which have Swiss registration plates or other marks of Swiss registration, provided the victim is a passenger for hire or reward whose journey begins or is intended to end in Switzerland, or, and this seems to be much more remarkable,<sup>69</sup> if he is resident in Switzerland at the time of the accident.<sup>70</sup>

All these attempts towards a more appropriate and flexible solution of the torts problems are very helpful on the way towards a just solution of the problem. Some unsatisfying factors however, are still inherent, in all of them. The best way by which the expression the 'proper law of tort' can be summarized is that it is the law with





which the parties and the acts done have the most significant connection.<sup>71</sup>

## 2. Justification for the Search for a More Flexible Rule

To judge the value and the necessity of a more flexible rule its advantages and the disadvantages, compared with the old rigid rule of torts, have to be examined and the result will show whether the application of the new approach is justified.

### A. Advantage of the Proper Law of the Tort

Comparing the proper law of the tort with the rigid rule, it is quite obvious that the rigid rule offers a certain security; the test of the '*lex loci delicti*' and the '*lex fori*' are easy to make and to apply. In this sense the result will be certain; but is it also just?

A rigid rule cannot take into account all factors, the casualty of the places of wrong and injury; the rigid rule cannot do justice to the single case. More unsatisfactory and hard solutions will be attained than the requirements of certainty and security would demand.

A flexible rule alone is socially convenient. The social factor, the motive of the acting, the whole circumstances mostly are located elsewhere than the well known places of the wrong of the injury will be found. A flexible rule, only, eliminates these accidental and fortuitious factors through an analysis of the acts. An ade-



quate decision, from the social and economic points of view, can only be reached by applying a flexible rule. Furthermore, this approach is applied by the internal law as well. The internal law considers the social and the economic factors as main points of a just decision.

The primary goal of private international law is not only security as to the rule which should be applied. Its primary goal is, above all, to reach just results, the uniformity within the decisions and not within the rules, the certainty in the question of what to expect and not what will be applied, and the predictability of the result.

These objects are achieved only by applying a flexible rule, by applying the proper law of the tort.

#### B. Disadvantages of the Proper Law of the Tort

The main disadvantage of the proper law of the tort appears to be, that the general uniform rule will likely to be split up in a thousand different conflicts sub-rules, especially designed to cover every possible tort situation and every tortious act which could happen.<sup>72</sup> Each of these rules would conform to a single case and will render a just result. The uniformity of the proper law rule will be totally lost.

#### C. Conclusion

The overwhelming advantages of the proper law rule as a rule of the most possible conformity to the modern conditions and tort



situations, but the inherent danger, that a uniform rule could be split up in several sub-rules, which on the one hand would lead to just results but on the other hand would cause a disastrous confusion in the conflict of laws in torts, is leading to the conclusion that the proper law rule is to be restricted to a choice of law between the systems of law which have the most significant relation<sup>73</sup> to the occurrence and the parties, or where a 'grouping of contacts'<sup>74</sup> indicates a determined system of law.

This idea has also been stated in *Boys v. Chaplin* by Lord Wilberforce<sup>75</sup>: "If one lesson emerges from the United States decisions it is that case to case decisions do not add up to a system of justice."

With such a solution, the necessity of predictability of the applicable law and therefore the predictability of the result, is satisfied; a problem which is, because of the antinomy between certainty and justice in private international law,<sup>76</sup> one of the most difficult goals to attain.

### 3. Consequences

If the rigid rule of the '*lex loci delicti*' and of the '*lex fori*' as well as a combination thereof, have to be abandoned in favor of a proper law of the tort, as it has been described in the first part of this chapter, the proper law of the tort has to be specified. The common residence, the common domicile, and the accessory connection of the tortious situation to contracts have to be considered.



This reasoning and the arguments raised in this part will lead, finally, into the main problem of this chapter, the application of the express choice of law by the parties involved in tort situations.

#### A. Common Domicile and Common Residence of the Parties Involved as a Choice of Law Connection

It is common knowledge that, once the conflict rules of the place of wrong and the forum are given up<sup>77</sup> and the 'proper law' applied, the common domicile or the common residence, the common place of carrying business are likely to determine the applicable law.

Attention will not be called to these problems, since the purpose of this chapter is to show that there exist different possibilities to make the proper law work. It will merely be mentioned in this context, that the law of the common residence must be favored. The law of the domicile or the law of the nationality appears to be less convenient to solve torts problems in an adequate manner. In the law of torts, domicile and nationality may be as 'accidental' and 'fortuitious' as the place of the wrong and, after all, the domicile and nationality principles play a minor role in the conflicts of torts; it is not so decisive as in the conflicts of domestic relations and succession. Torts happen within the social environment of the parties involved, they happen by means of and because people are living. A foreigner usually adjusts his behavior according to the laws of the country where he lives, although he personally can live according to his '*lex patriae*', but socially he has to satisfy the rules of conduct of the society within which he lives. Torts rules regulate the wrongs done and their consequences according to the social environment and the "wrongdoer as well





as the injured party use (for the activity as well as for the suffering) to start from the view of their daily milieu, that means their ordinary residence".<sup>78</sup> Furthermore, the parties involved usually bring their claims before the courts of their residence. In such an application of the law of the common residence, it will be of no importance whether the parties met before, whether there exists another link, like a common excursion, or if they met accidentally, by the first time because of an accident.

It is, after all, in the parties' interest, that the common law of their residence will be applied.

In this sense, the same result would have been achieved in *McLean v. Pettigrew*<sup>79</sup> without masking the influential policy considerations by resorting to an artificial technicality.<sup>80</sup> This solution seems to be happier than the proposed Tentative First Draft of the Foreign Torts Act.<sup>81</sup>

The same results would have been reached in a more elegant manner and without artificial constructions in *Chaplin v. Boys*<sup>82</sup> and in *Babcock v. Jackson*.<sup>83</sup>

The same solution as above stated is also provided in the Swiss Federal Road Traffic Code Art. 85 II.<sup>84</sup>

B. Torts in Connection with Contractual Duties: The 'Proper Law of the Contract' Applies.<sup>85</sup>

Some times it may not be quite clear whether respons-



ibilities and duties arise out of contractual violations or whether it is a real tort situation.

Torts situation have been solved by applying the 'proper law of the tort', a proper law, influenced by the social circumstances of the committed tort.<sup>86</sup> Another possibility in judging upon the tort situation could be by applying a proper law influenced by the legal circumstances. In municipal law, claims for damages can be based on both, contractual and tortious liability.<sup>87</sup> Furthermore, the legal relationship between the parties involved can be considered as a decisive relationship regarding the choice of law according the the proper law rule<sup>88</sup> and the legal link between the wrongdoer and the injured party may call attention to the law which governs the contractual relation as in employment contracts<sup>89</sup>, in transportation contracts<sup>90</sup> and in other contracts.<sup>91</sup>

In the case *Walpole v. Canadian Northern Railways Co.*<sup>92</sup> a resident of the Province of British Columbia was killed in that Province in the course of an employment by the CNR company. His wife subsequently went to the Province of Saskatchewan and sued there under the Fatal Accidents Act of the Province, under which an action can be maintained only if the deceased person could have maintained an action and recovered damage. Common employment is not a defense in Saskatchewan.

The effect of the Workmen's Compensation Act of British Columbia and particularly of s.11 sub-s 1 was that the deceased, who was resident and employed in British Columbia, held his contract of employment subject to the double condition -first, that he should be entitled to compensation for accidents, however caused, and, secondly, that he should have no other remedy. These conditions were, by virtue of statute incorporated in his contract, and were binding upon him wherever his action might be



brought; and if he had lived and had himself commenced negligence, the condition would have been a sufficient answer to his claim.<sup>93</sup>

The '*lex causae*' of the contract would govern the tort situation in such cases as well. Why should a tort claim, arising out of a contractual relationship, be governed by a different system of law, where in private international law enough difficulties already exist, and anyhow the consistency of caselaw is in danger?

Claims for damages within the family are usually governed by the law which regulates the domestic relationship and that law applies wherever the accident may occur. This law also governs the question of the immunity of family members.<sup>94</sup>

The proper law of a tort based on a pre-existing legal relation promotes a desirable security within the private international law and ancillary questions can be dealt with by applying the same rules.

Questions of characterization and especially problems arising out from the relation between contracts and torts in cases where a motor-accident insurance is involved could be solved in a most suitable manner.<sup>95</sup> It is well known that the courts of this country have evaded the '*lex fori*' principle by artificial constructions of contract situations in cases of motorcar accidents involving a driver, a host and an insurance company. This actually happened in *Key v. Key*<sup>96</sup> and in *Assad v. Latendresse*<sup>97</sup> but has been rejected and replaced by an even more artificial approach in *McLean v. Pettigrew*.<sup>98</sup> In this case a Quebec resident invited another Quebec resident for a trip in his motorcar to



Ontario. The guest suffered injuries caused by an accident in the Province of Ontario. The courts held, that there is no contract between a driver and a gratuitous passenger. But then, it was held that the defendant's act was not justifiable in the ground that he was criminally liable under Ontarian law, even though he had been acquitted.

Why must this complicated and artificial construction of some kind of a contractual relationship between the driver and the guest be established, if it would be much easier to connect the tort situation to an existing contract, e.g. the insurance contract between the driver and his insurance company?

#### C. Express Choice of the Proper Law of the Tort by the Parties

Once the proper law theory finds its application within the conflict of torts, its importance and range has to be examined.

Referring back to the 'proper law of the contract' it has been defined that this rule has two branches.<sup>99</sup> The first branch covers the express choice of law by the parties; while the second branch was to be applied in the case where no express choice was effectuated. In this latter case, the law which has the most substantial and the closest connection to the facts and to the issues in question was to govern the contract.

Within the tort situation, it has been admitted that the foreign tort has to be governed by the law which has the most significant relation between the occurrence and the parties involved or the law





designated by a grouping of contacts.<sup>100</sup>

Within the proper law theory explained in the first subtitle<sup>101</sup>, the second branch of this theory would only be covered by the tort rule. Therefore, it should be determined whether an application of the first rule which would consist in an express choice of the proper law of the tort by the parties, could be justified and whether it would be judicious to solve the torts crisis in the conflict of laws by means of a subjective choice<sup>102</sup> of the applicable law.

The courts' decisions to date, do not touch the question and neither statutes nor civil law codes provide much assistance. Only a few<sup>103</sup> of the academic writers have considered the question; the reason therefore might be found in the fact that torts are often dealt with within the law of obligations generally,<sup>104</sup> and that within the law of obligation, an express choice of law by the parties has been dealt with almost exclusively in the law of contracts. Furthermore, the express choice of law by the parties is a subject which has been under discussion for a few decades only and it has been accepted as a governing rule principle, and in contracts exclusively, within the last few years only.

Therefore, the reasons for and against such an approach in torts have to be considered and a conclusion on these facts has to be made.

#### (a) Reasons for Approval of the Possibility of Applying the Law Chosen by the Parties:



In the case where no authority and no statute permit an express choice of law by the parties in international relations, it is advisable to refer to the appreciation of interests within the internal law. This method has been proven valuable and legitimate to show that in contracts the principle of private autonomy in internal law leads to the principle of party autonomy on the international plane.<sup>105</sup>

The law of torts in domestic law leaves the parties a wide sphere of action, although the tortious liability arises '*ex lege*'. Because the law of torts is basically '*ius dispositivum*', in opposition to '*ius cogens*', the injured party can renounce an action of damages, or he can bring it forth for a limited amount or liability can be excluded in advance, or even the law itself may set time limitations for actions.<sup>106</sup> Hence, the '*bonnes moeurs*',<sup>107</sup> and legislative Acts can limit private autonomy in torts, as they do in contracts.

Once the concept of private autonomy is admitted in internal law, it is a small step to make in giving approval to the ideas of an express choice of the governing law for multi-jurisdictional torts.<sup>108</sup>

Furthermore the parties have a legitimate expectation that their legal relations will be judged by application of a system of law with which both judge and parties are familiar. The parties are best qualified to determine to which system of law the tort situation has the most substantial connection.



Such a solution provides in a satisfactory manner for security in application of a rule of law and for the goal of realizing personal freedom as an idealistic value in a system of law.<sup>109</sup>

(b) Reasons for Rejecting the Possibility of Applying the Law Chosen by the Parties:

A strong argument against the application of the law chosen by the parties to govern their multi-jurisdictional torts is that the parties find themselves obligated not voluntarily and by agreement, as is the case in the law of contract, but in an involuntary manner. Therefore, a public interest exists, that everybody conducts himself according to the rules existing at the place of action, may he appear as tortfeasor, as acting in self defence or as an intervening spectator. Therefore, and because the rights of third parties<sup>110</sup> may be involved, it can be deduced that the parties should have no possibility of influencing the law governing the 'involuntary relationship'.

Another argument against the extension of the party autonomy principle into international torts may be that some rules of torts are absolutely mandatory. These tort rules are then of an 'internal order public'. It is however, a common place, that rules which enjoy the position of internal public policy do not gain this status on the international plane automatically.<sup>111</sup> And even if these rules were absolutely mandatory, it has been established that the principle of the choice of the proper law includes the evasion of the '*as-such applicable law*' including its '*ius cogens*' in opposition to the principle of incorporation of foreign law,<sup>112</sup> and that the chosen law, the '*lex causae*', will be applied including its '*ius cogens*'.<sup>113</sup>



(c) Conclusion:

It is obvious that even if there exist mandatory rules in torts, they will not affect an express choice of law by the parties, based on the party autonomy principle. The chosen law is applicable, its '*ius cogens*' included, because the mandatory rules of the '*as-such-applicable law*' are evaded.

It has been said that the public interest requires an application of the '*lex loci delicti commissi*'. The parties interest may make an exception where parties with the same residence are involved and actions for damages arise out of a tort committed abroad. In this case the parties' interest would prevail.<sup>114</sup>

Basically the parties' interest is respected by allowing the parties involved to choose the system of law to govern situations with which they are closely bound up, a system of law to which both parties and the cause of action are closely connected. Why should the door leading to the application of the party autonomy principle in torts, the door which stands slightly open, not be opened totally? Claims for damages due to personal injury, personal harm and physical injury are mostly subjects of a highly personal character and surely within the parties' interest.

It is legitimate to draw an analogy to the law of contracts, and probably advisable. Although the obligation of contracts supposes a party agreement, the obligation of a tort arises '*ex lege*'; the breach of contracts and the breach of duties however, are basically





treated equally and show no doctrinal differences.<sup>115</sup>

In international law the '*lex loci actus*' was a decisive principle in both, contracts and torts. In torts alone the '*lex loci actus*' rule still is decisive in the form of the '*lex loci delicti commissi*'; but the application thereof has much been criticized.<sup>116</sup> If the fixed principle of the '*lex loci delicti commissi*' should be abandoned, the logical reasoning should be followed to the end of the application of the flexible rule of the proper law including the parties express choice of the applicable law.

Such a choice of law could be made in advance, the parties entering in any kind of relation simply make an agreement like a suspensive condition that, if any claim for damages arises out of a tort, the action should be governed by the law of the state X. Often the parties could designate the law governing a contract already existing between them.

In most cases such agreements could be made at the beginning of the trial, when all the parties involved are known and the proper law of the tort can be determined properly. The majority of cases would be settled out of court by applying the law chosen by the parties.<sup>117</sup>

As in contracts, the choice will be qualified so as to protect the weaker party, third parties or the insurance company against abuse.<sup>118</sup> The concept of public policy will fulfill this duty in general.



### III. Summary and Conclusion

It is obvious that neither the '*lex fori*' or the '*lex loci delicti commissi*' nor a combination of both of them can solve the problems posed by the modern tort situation on an international plane. A new approach has to be found, and a more flexible and 'just' solution which takes all the circumstances of a case and especially the social environment into account, has been found in the 'proper law of the tort'.

The proper law of the tort is the law to which the parties and the occurrence have the closest and most significant connection, or where a grouping of contacts indicates a particular system of law.

Consequently, this most significant relation or indicating contact will be-

- in the first place, the express choice of a system of law by the parties;
- secondly, the accessory connection to a legal relation already existing between the parties (employment contracts, domestic relations, sales contracts, etc.);
- thirdly, the law of the common residence;
- and finally, the place of the wrong.

The only restriction on this application is the general rule of public policy.



#### IV. Footnotes to Chapter Three, Second Subtitle

1. They may have different domiciles, be resident in different countries, running business in different places, etc.
2. The wrong is done in one state but has its effects in another state, e.g. by means of broadcasting or television.
3. As for instance for problems arising out of a car accident, where the insurance is carrying business in a completely unconnected location.
4. *Supra* 17. Rabel 235.
5. *Supra* 32.
6. *Jenner v. Sun Oil* [1952] 2 D.L.R. 526; *Original Blouse Co. v. Bruck Mills* (1963) 42 D.L.R. (2d) 174; *Abbot-Smith v. Governors of University of Toronto* (1964) 45 D.L.R. (2d) 672; *Thompson v. Distillers Company (Bio-Chemicals)* [1968] 3 N.S.W.R. 3.
7. Restatement (1934) 377.
8. Restatement, Second, Conflict of Laws, para. 145, S.2(a).
9. 2 *The Conflict of Laws* 301.
10. Therefore this theory is usually called 'the last event rule'.
11. The question still remains which law would be applicable if A was poisoned in X, but dies only in Z.
12. Leflar *American Conflicts Law*, (1959) 317 *et seq.* with indication of cases and literature; in the same sense Batiffol, *Droit international prive*, (1967) 601,608; 'Il semble donc preferable d'appliquer la loi du lieu du dommage', with cases.
13. *Infra* 62 *et seq.*
14. *Supra* 60.
15. See Raape, *Internationales Privatrecht*, (5th ed. Berlin/Frankfurt, 1961) 536; Ballardore Pallieri, *Diritto internazionale privato*, (2nd ed. Milano, 1950) 253; French and Italian courts and the Code of Czechoslovakia and Greece, see 2 Rabel 303, 304.
16. Reichsgericht 54, 198 at 205; Bundesgerichtshof in *Neue Juristische Wochenschrift* 64 at 2012.



17. Schweizerisches Bundesgericht, BGE 22, 1164; BGE 82 II 163; BGE 87 II 115; BGE 91 II 123, 446.
18. Kegel, *Internationales Privatrecht*, (3rd ed. München, 1971) 266, cites a case decided by the Oberlandesgericht, Saarbrücken, Neue Juristische Wochenschrift 58, 752 in which a French powerplant produced smoke and sock on the French bank of the river Saar which interfered with a German gardenrestaurant on the other bank of the river. A French law was applied because it favoured the injured party.
19. 2 Rabel 306.
20. See example *supra* 61.
21. A most famous example for such a situation is the case *Reich v. Purcell* 432 P. 2d, 727 (1967) where a motorcar accident occurred in Missouri, the parties involved were residents of the States Ohio and California. Chief Justice Traynor based his judgment on the governmental interest theory and applied the law of Ohio which did not limit the amount of damages. For comments see Cavers, Cheatham, Currie, Ehrenzweig, Leflar and Weintraub, (1967-68) 15 U.C.L.A. Law Rev. 551.
22. *M'Elroy v. M'Alister*, [1949] Sess. Cas. 110 in which case a Scotsman, employed by a Scottish firm, when riding in a truck on the firm's business was killed in an accident caused by the fault of the firm's driver. The only connection with England was that the accident occurred in the English County of Westmoreland. See also Swiss Federal Road Traffic Code Art. 85 II *infra* n. 70.
23. *Babcock v. Jackson*, 12 N.Y. 2d 473 (1963), but see *Dym v. Gordon* 16 N.J. 120, (1965); *Kell v. Henderson*, 270 N.J.S. 2d 552 (1966), which, however, is considered as one of the 'forum shopping' examples.
24. *M'Elroy v. M'Alister* [1949] Sess. Cas. 110.
25. *Mueller v. Marx* BGE 66 II 165. The Swiss Federal Tribunal applied Swiss law as the '*lex loci delicti*' rather than French law, in case where a French lady travelling in a French motorcoach owned by a French firm was killed in a crash between the bus and Swiss Federal Railway in Switzerland because of the French driver's negligence.
26. *Savigny Systems des heutigen roemischen Rechts*, Bd. 8, (Berlin 1849) 275 *et seq.*





27. Waechter, *Ueber die Collision der Privatrechtsgesetze verschiedener Staaten*, (1841) 24 Archiv fuer die civilistische Praxis 230 *et seq.* (1842) 25 *id.* 1,161,361 and 392: 'The judge must punish in accordance with the laws of his own state crimes committed abroad over which he has jurisdiction. In the same way, he must, as a rule, determine exclusively in accordance with the same laws the private law consequences of delictual acts committed abroad!' (translated).
28. (1868) L.R. 2 P.C. 193.
29. Kahn-Freund, *Delictual Liability and the Conflict of Laws*, (1968-II) 124 *Receuil des cours* 20.
30. (1869) L.R. 4 Q.B. 225 and *aff'd* in (1870) L.R. 6 Q.B.1.
31. (1869) L.R. 4 Q.B. 239.
32. *Infra* 69 *et seq.*
33. For Canadian cases *see*:  
*O'Connor v. Wray* [1930] 2 D.L.R. 899 at 912.  
*Simonson v. Canadian Northern Railways* (1914) 17 D.L.R. 516.  
*Young v. Industrial Chemicals Co. Ltd.* [1939] 4 D.L.R. 392.  
 For approval *obiter*:  
*Canadian National S.S. Co. v. Watson* [1939] 1 D.L.R. 273.  
*McLean v. Pettigrew* [1945] 2 D.L.R. 65 at 77.  
*see also* Cr  peau, *Views from Canada* (1971) 19 *Am. J. Comp. L.* 17.
34. *See* Kahn-Freund, *loc.cit.* 21; Nadelmann, *International Developments in Choice of Law Governing Torts*, (1971) 19 *Am. J. Comp. L.* *et seq.*  
*De Nova, Historical and Comparative Introduction to the Conflict of Laws*, (1966-II) 118 *Receuil des cours* 435.
35. (1897) 2 Q.B. 231.
36. Holmes, *The Common Law*, (1881) 144, *et seq.*
37. Morris 251.
38. Fleming, *The Law of Torts* (3rd ed. 1965) 256 *et seq.*
39. 224 N.Y. 99, 120 N.E. 198 at 201 (1918).
40. *Supra* 59 *et seq.*
41. *Infra* 69 *et seq.*
42. Despite the American case *Walton v. Aramco* 223 F(2d) 941 in which the plaintiff lost a case, unable to prove Saudi Arabian Law. *See also* Abu Dhabi Oil Arbitration [1951] I.L.R. 144.



43. See in this context for more details Kahn-Freund, *op. cit.* 29 *et seq.*
44. *Chaplin v. Boys* [1969] 2A11 E.R. 1085, at 1098F.
45. *Canadian National Steamship Co. Ltd. v. Watson* [1939] S.C.R. 13; *O'Connor v. Wray* [1930] 2 D.L.R. 912; *Story v. Stradford Mill Building Co.* (1913) 11 D.L.R. 49 at 51.
46. Hancock, *Torts in the Conflict of Laws*, 54 *et seq.*
47. (1937) 63 Que. K.B. 278.
48. *Id.* 284.
49. (1870) L.R. 6 Q.B. 1.
50. *Id.* at 28/29; this rule has been affirmed in *Boys v. Chaplin* [1971] A.C. 356.
51. Lorenzen, *Tort Liability and the Conflict of Laws*. (1931) 47 L.Q.R. 483; Lorenzen, *Selected Articles on The Conflict of Laws* 376; Hancock, *Torts in the Conflict of Laws* 89; Dicey and Morris 922; Morris 262; Cheshire-North 263 *et seq.*; Morris, *The proper law of a tort* (1951) 64 Harv.L.Rev. 881 *et seq.*; Fridman, *Damages for 'foreign torts'* (1967) 117 N.L. Journal 1128.
52. *Supra* 59 *et seq.* for the '*lex fori*' and 64 *et seq.* '*lex loci delicti commissi*'.
53. Castel, *Conflict of Laws - Torts - Time for a Change*, (1971) 49 Can.Bar Rev. 632; Clarence Smith, *The Foreign Torts Act: Look Before You Leap*, (1970) 20 U of T.L. Journ. 81; McGregor, *The International Accident Problem*, (1970) 33 Mod.L. Rev. 1 *et seq.*
54. *Gronlund v. Hansen* (1968) 65 W.W.R. 485, 69 D.L.R. (2d) 598 and revision thereof SCBC in (1969) 68 W.W.R. 329, 4 D.L.R. (3rd) 435; *Le Van v. Danyluk and Danyluk* 75 W.W.R. 500.
55. *Esp. Babcock v. Jackson* (191) N.E. (2d) 279 (1963).
56. (1870) L.R. 6 Q.B. 1.
57. [1971] A.C. 356.
58. In this sense see Baer, *Conflicts of Laws - Torts - A Blind Search for a 'Proper' Law*, (1970) 48 Can. Bar. Rev. 161; Castel and Grépeau, *Views from Canada*, (1971) 18 Am.J. Comp.L. 17,25, *et seq.* and Castel, *Conflicts of Laws - Torts - Time for a Change*, (1971) 49 Can. Bar Rev. 632.



59. *Supra*, n.6.
60. Morris, *The Proper Law of a Tort*, (1951) 64 Harv.L.Rev. 881 *et seq.*
61. Castel, *Conflict of Laws - Torts - Time for a Change* (1971) 49 Can. Bar Rev. 635.
62. In detail, Morris, *The Proper Law of a Tort*, (1951) 64 Harv. L. Rev. 881, *et seq.*
63. This is the proposition of the Restatement, Second, Conflict of Laws, S.145.
64. Proposed 1966 by Dr. Read. Text in (1971) 19 Am.J. Comp. L. 31.
65. See also Hancock, *Torts, Problems in Conflict of Laws Resolved by Statutory Construction: The Halley and Other Older cases Revisited*, (1968) 18 U of T L.J. 331 and the application of these principles at 334-340.
66. Text in (1971) 18 Am.J.Comp.L. 33; (1971) 49 Can.Bar Rev. 635.
67. English text in (1968) 16 Am. J. Comp. L. 589.
68. Bundesgesetz ueber den Strassenverkehr (SVG) vom 19.12. 1958, (Amtliche Sammlung 1959, 679).
69. Kahn-Freund, *Delictual Liability and the Conflict of Laws*, (1968-II) 124 *Receuil des cours* 17.
70. Art. 85 II SVG:  
Verursacht ein mit gueltigen schweizerischen Kontrollschildern oder Kennzeichen versehenes Motorfahrzeug oder Fahrrad einen Unfall im Ausland, so wendet der schweizerische Richter die Haftpflicht- und Versicherungsbestimmungen dieses Gesetzes an auf Ansprueche
  - a) aus dem Schaden von Personen, die mit einem solchen Motorfahrzeug gegen Entgelt befoerdert wurden und die Fahrt in der Schweiz angetreten haben oder beendigen wollten,
  - b) von Geschaedigten, die zur Zeit des Unfalles ihren Wohnsitz in der Schweiz hatten.
71. Lord Denning M.R. in *Sayers v. International Drilling Co. N.V.* [1971] 3 All E.R. 166.
72. With this argument the proper law of the tort has been severely criticized by Wengler, *Festschrift Rheinstein*, I (1969) 316 N.30; Kegel, *The Crisis of the Conflict of Laws*, (1964-II) 112 *Receuil des cours*, 95, 180 *et seq.*



- Heini, *Bemerkungen zur schweizerischen Rechtsprechung*, ZSR n.F. 86(1967) I 265 et seq.; DeNova, *Conflict of Laws and Functionally restricted Substantive Rules*, (1966) 54 Calif.L.Rev. 1569; Eek, *Babcock in Sweden*, (1966) 54 Calif.L.Rev. 1575; Karsten, *Foreign torts and English Courts*, (1970) 19 I.C.L.Q. 45.
73. Restatement, Second, Conflict of Laws, para. 145.
  74. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E. 2d 279 (1963).
  75. *Boys v. Chaplin*, [1968] 2 W.L.R. 343.
  76. Generally regarding the antinomy between certainty and justice in private international law and the necessity of an exchange; see in detail and convincing, Neuhaus, *Law and Contemporary Problems* (1963) 28 at 795
  77. Castel, *Conflict of Laws - Tort - Time for a Change*, (1971) 49 Can. Bar Rev. 632.
  78. Schoenenberger, *Zuercher Kommentar zum Schweizerischen Zivilgesetzbuch*, V/1a (1961) N 328.
  79. [1945] S.C.R. 62.
  80. Castel and Crépeau, *Views from Canada*, (1971) 19 Am. J. Comp. L. 31 et seq.
  81. *Supra* 71.
  82. [1971] A.C. 356.
  83. 191 N.E. (2d) 279 (1963).
  84. *Supra* 72.
  85. See Kahn-Freund, *Delictual Liability and the Conflict of Laws*, (1968-II) 124 *Receuil des cours* 129: 'Escape into Contract?' for a more detailed and convincing explanation.
  86. *Supra* 73.
  87. Pollock, *Torts* 432; Fleming, *Torts* 432,
  88. *Supra* 74.
  89. See e.g. *Walpole v. C.N.R.* [1923] A.C. 113; *McMillan v. C.N.R.* [1923] A.C. 113.
  90. See e.g. *Kilberg v. North East Airlines* 172 N.E. (2d) 526 (1961); *Naftalin v. London Midland and Scottish Railways* (1933) Sess. Cas. 259.





91. As sales contracts, deposit contracts, etc.
92. [1923] A.C. 113.
93. *Id.* at 118.
94. *Emery v. Emery* 45 Cal.2d 421, 289 P.2d 218 (1955);  
*Thompson v. Thompson* 105 N.H. 86, 193 A.2d 439 (1963);  
 and see Jayme, *Interspousal Immunity: Revolution and Counterrevolution in American Tort Conflicts*, (1967) 40  
*So. Cal. L. Rev.* 307 *et seq.*; Felix, *Interspousal Immunity  
 in the Conflict of Laws: Automobile Accident Claims*,  
 (1968) 53 *Cornell L. Rev.* 406
95. Collins, *Interaction between Contract and Tort in Conflict  
 of Laws*, (1967) 16 *I.C.L.Q.* 103
96. (1930) 65 Ont. L.R. 232 (Ont. App. Div.).
97. (1941) 79 S.C.R. 286.
98. [1945] 2 D.L.R. 65 (S.C.).
99. *Supra* 32 *et seq.*
100. *Supra* 72.
101. *Supra* 69 *et seq.*
102. *Supra* 15 *et seq.*
103. Bourel, *Les Conflits de lois en matière d'obligation  
 extracontractuelle*, (Paris 1961), 18 denies such appli-  
 cation of the express choice of law by the parties be-  
 cause of the absolute rigid character of the tort rules.  
 Lamaire, *Het Nederlands Internationaal Privaatrecht*,  
 (The Hague 1968) 285 gives approval without further  
 reasoning.  
 Kropholler, *Ein Anknuepfungssystem fuer das Deliktsrecht*  
 (1969) 33 *RabelsZ* 601 *et seq.*
104. See e.g. Cheshire-North 197.
105. *Supra* 16 *et seq.*
106. For many, see Clerk & Lindsell on Torts (13th ed. 1969):  
*Volenti non fit injuria*, para. 95 *et seq.*
107. Morality or high principles which are general guidelines  
 for the living together.
108. Oftinger, *Schweizerisches Haftpflichtrecht*, Band I, 452:  
 'Where the parties can exempt or restrict the tortfeasors  
 liability, an express choice of law must be permissible;  
 where, however, an exemption or a restriction is inadmis-



sible, Swiss law cannot be excluded by stipulation (Translated).

109. *Supra* 15 *et seq.*
110. *e.g.* insurance companies
111. *Supra* 30
112. *Supra* 23 *et seq.*
113. *Supra* 18 *et seq.*
114. *Supra* 24 *et seq.*
115. See also Prosser, *Borderland of Tort and Contract*, in *Select Topics on Torts*, Ch. 7 (1953).
116. *Supra* 29.
117. Panchaud, in *Actes et Documents de la XI<sup>eme</sup> Session de la conference de La Haye en Droit International Prive*, III, 1970, 206, '995 out of 1000 automobile accident cases were settled out of court last year'.
118. See *e.g.* an example by Neuhaus, *Die Grundbegriffe des Internationalen Privatrechts*, (Berlin/Tuebingen 1962) N. 420: Provision on a steamboat ticket: 'In the case of a conflict of laws, the ship and the shipper enjoy the most favorable law'.



### Third Subtitle: MATRIMONIAL RELATIONS

This third subtitle deals with special aspects in Family Law as they might be brought about by marriages and matrimonial causes with foreign elements.

In the first part of this chapter, the nature of the matrimonial relationship will be examined and according to its special concept, it will be characterized regarding to its legal and social effects. In the second part then, the formation and the dissolution of the marriage will be examined in the light of whether the parties' influence on the choice of law process might contribute to a more adequate solution of these problems, if a choice of law question does arise at all. A conclusion will follow as a third part.

#### I. The Nature of the Matrimonial Relationship

Legal relations in matrimonial law are a mixture of many different legal components, having effects not only in the legal but also in the social sphere of society.

First of all, a marriage is formed as if it were a simple contract, whereby capacity and compliance with the local form seem to be the only decisive aspects thereof; it seems to be a simple agreement between the two parties to marry each other.

In a normal and ordinary contract, such as a contract for the sale of goods or an employment contract, this agreement will not have any influence on persons other than the contractors. It also is in



in their discretion to end this contractual relation, which happens automatically in a sales contract by exchanging the relevant goods against an adequate compensation, in the labor contract by a contrary agreement.

This is not the case in a 'marriage contract'. Although marriage originates in a contract, it is a contract 'sui generis', it does create rights and duties not only between the two parties, but furthermore, it creates a status that also affects the society to which the two parties belong.<sup>1</sup> Marriage is to be recognized by all members of that society, and husband and wife enjoy a particular status within this society. They are, as founders of a family, the cornerstone of this society.

The 'marriage contract' furthermore is a contractual agreement on which "no condition can be attached and no qualification can be made on its effect".<sup>2</sup> Therefore it follows that no limit of duration can be set upon this agreement<sup>3</sup> and marriage and matrimonial relations are regarded as 'legal relationships of long duration'.

Marriage is not to be dissolved by a contrary agreement between the parties. Marriage can be dissolved on the basis of defects only.<sup>4</sup> Marriage normally finds a natural end, it is dissolved by death. It is the same relationship of long duration and constancy as fatherhood and sonship.<sup>5</sup> All these matrimonial and family relations will be incapable of being dissolved by the parties' own will.





However, this idea of marriage as a permanent matrimonial relation has been weakened by the generous application of divorce grounds by the courts, which attitude could lead to an acceptance of divorces by parties' consent.

Nevertheless, marriage creates a status of matrimonial relation which has its influence on and is influenced by an interior factor, namely the living together in the family as a home and place of constancy of the younger generation as the children of the marriage; and it has influence on and is influenced by the society in which husband, wife and children live: they have their social functions as a cornerstone of a society to form the community and the nation they live in.

Therefore, matrimonial legal relations bear a strong personal intrinsic value, they are mostly concerned with intimate personal questions. This might also be the reason that generally the 'personal law' of the parties governs the matrimonial legal relations. The personal law can be the law of the parties' domicile, the law of their nationality or of their common residence.

The application of the 'personal law' bears difficulties and it does not generally render justice to the interests of the matrimonial relation as such nor to the parties' interest.

First of all there is the difficulty in solving the question of which law will be the 'personal law' out of the different approaches proposed and applied; the law of the domicile, the law of the nationality or the law of the common residence of the parties.



Furthermore, none of these three possible approaches does justice to the social and personal interests which are inherent in the matrimonial relations. The '*personal law*' is easily changeable; domicile, residence and even citizenship can be altered easily and without difficulties concerning the respective official bodies. The matrimonial relations characterized as legal relations of a long duration, should be governed by the same law as long as they exist and they should not be subjected to different legal systems whenever the parties change their domicile, residence or nationality.

Sometimes however, it is obviously in the parties' interest to abandon a certain domicile, a certain citizenship to which they are bound '*de iure*', but '*de facto*' no longer have any relation to that state. Refugees escaping out of their native country are followed by the laws of the country, with which they want to interrupt any kind of relation. This is an unacceptable hardship.

On the other hand, a '*personal law*' based on the law governing the relationship since it came into existence can show hardships too. A system of law to which the parties and the matrimonial relation do not have and never had any other connection other than that that system of law just happened to govern the relation at the time when it was founded, surely cannot be regarded as a law which really has a real and substantial connection with the relation and the parties concerned.

Furthermore, the '*personal law*' governing matters with regard to the whole family, husband, wife and children is based on the person who is the absolute sovereign in family matters, namely the husband. There is, as in archaic times, no question of equal rights in



regard to decisions within the family; the husband and fathers word is decisive, Equality of rights in conflicts of laws seems never to have been in question.

All these contradictory bases of the application of a '*personal law*' show undoubtedly that such a law cannot be considered as an appropriate and just solution, which after all, should be a primary goal of a system of law and especially of conflict of laws rules.

Despite the fact that there are strong personal intrinsic values, it can never be derived therefrom, that the parties alone have an interest in the legal qualification of their relationship. Community, society and the state they live in have a specific interest in the matrimonial relationship and characterize the relation not only as legal but also as sociological. And therefore, it will never be in the parties' discretion alone to exert influence on the legal system that should be applied. The interest of the society as a third party has to prevail and a rigid rule, even if the application thereof brings some inconveniences has to be retained. The personal law of the parties, the law of their domicile alone, fulfills the standards set by the social structure of the family and the community and the difficulties in applying the domicile maxim have to be taken into account as a necessary evil.

## II. The Problem of the Governing Rules

Under this subtitle, special problems out of the family conflicts of law will be dealt with and it has to be determined if a '*proper law of family relations*' could be found, justified and introduced into the existing conflict rules.



## 1. Marriage

The contract in which marriage originates differs fundamentally from a mercantile contract.<sup>6</sup> Although the formation thereof is similar, for the parties have to have capacity to enter such a contract and the local forms as to the formation have to be respected, the effects of this contract are directed towards a change of status and in the special case of the '*marriage contract*' directed to the acquisition of the status of marriage.

Therefore, the nature of this contract is characterized by the interest the society and all the members of the community have in it. Therefore, the formation, extent and dissolution of this special contract is strongly controlled by the '*personal law*' of the parties.

The interdependence of contract and status and the nature of the matrimonial relationship demand that this type of contract has to be treated differently.

### A. Capacity

The law governing capacity of the parties to be married has been split up into two theories.

The old idea that the '*ante-nuptial domicile*' should govern the questions related to capacity of the persons to be married has been embarrassed by the so called '*matrimonial domicile*' theory, meaning that the law of the intended matrimonial domicile, the law of the country where the parties want to live after the marriage ceremony, should govern questions of capacity.





### (a) The 'Antenuptial Domicile' Theory

The 'antenuptial domicile' theory or the 'dual domicile theory',<sup>7</sup> says that the *lex domicilii* of each party must be satisfied and the marriage will be invalid by incapacity of the person contracting the marriage agreement. This principle is well settled,<sup>8</sup> but suffers from disadvantages which may cause deplorable situations and may "cause injustice of a particularly pernicious kind".<sup>9</sup> The most obvious situation may be that the 'antenuptial domicile' rule can be easily evaded by choosing a domicile whose laws do not bar the intended marriage. These problems were adjudicated on in the case *R. v. Brentwood Superintendent Registrar of Marriages, Ex. parte Arias*.<sup>10</sup> In this case an Italian national domiciled in Switzerland had been divorced at Berne from his wife who was Swiss both by nationality and domicile. By Swiss law capacity to marry is governed by the national law of the parties. Therefore, the wife, qua a Swiss national, was free to marry again and had done so; but the husband was not, since in the eyes of Italian law his marriage still subsisted.

In order to circumvent this disability the husband and his fiancée, a Spanish national domiciled in Switzerland, came to England where they proposed to marry and then to return to Switzerland. The registrar refused to issue a certificate or license on the ground that there was a lawful impediment to the marriage in that the man lacked capacity to marry by his '*lex domicilii*'.

This case shows not only the problems of evasion of law but it introduces also the problem of the "public concern of the country of his domicile"<sup>11</sup> where such nationality would govern. Galli the Italian national, wanted



to stay in Switzerland for the rest of his life and therefore, the Italian state had no concern with the social morality of the marriage of this its citizen at all. Only the country where the married couple wants to live has an interest in the effectiveness of the valid marriage.

Furthermore, the "technical Domicile does not always represent one's home"<sup>12</sup> and due to the uncertainty which is produced by this distinction, it can happen that a marriage will be treated as valid in one but as invalid in another country. This is the case when either of the parties abandoned his domicile of origin and shows no intention of ever returning, but is at the moment uncertain where the permanent home will be established. During his temporary stay in X a person gets married. Which will be his domicile for purposes of capacity to enter into a marriage?

#### (b) The '*Intended Matrimonial Home*' Theory

The tendency today drifts towards a new approach which takes into account not only legal reasoning but also sociological arguments. This theory wants the law of the '*intended matrimonial home*' to be applied. "Marriage is an institution that closely concerns the public policy and the social morality of the state",<sup>13</sup> it has therefore to be adjudicated upon with regard to the laws of that state where the parties live and set up their home. This seems to be in accordance with the law governing commercial contracts.<sup>14</sup> Even in Savigny's time it seemed to be that "the law of the husband's domicile should be decisive because the wife moves to the domicile of the husband".<sup>15</sup>



However, it might be said that it would be impossible to predetermine whether a marriage will be valid or whether it is void at the time of the act of celebration.<sup>16</sup> But a possible answer might be that, if the place of the future home is doubtful, it is presumed to be the domicile of the husband at the time of the marriage.<sup>17</sup>

Neither of these two theories is entirely satisfactory. Therefore, and to "mitigate any hardships"<sup>18</sup> the Royal Commission on Marriage and Divorce proposed an alternative test for the parties' capacity:

If the marriage is alleged to be void on another ground than that of the lack of formalities, that issue shall be determined in accordance with the personal law or laws of the parties at the time of the marriage (so that the marriage shall be declared null and void if it is invalid by the personal law of one or other or both of the parties); provided that a marriage which was celebrated elsewhere than in England or Scotland shall not be declared void if it is valid according to the law of the country in which the parties intended at the time of the marriage to make their matrimonial home and such intention has in fact been carried out.<sup>19</sup>

This recommendation excludes the criticism brought forth and the validity of such a foreign marriage is not in doubt.

### (c) Inferences

The '*antenuptial domicile*' theory is conclusive. There is no question of a parties' intention nor an express choice of law governing the marriage. The law of the parties' domicile before the ceremony is decisive on its validity.

The '*intended matrimonial home*' theory, however, provides some scope for a choice of the governing law as to capacity for the parties. It is in their discretion to choose the country where





they want to establish their home. However, one cannot look at it as party autonomy, as is the governing principle in international contracts and soon will be in torts. First of all the parties social environment is more concerned than the two domains dealt with in the previous chapters. It seems to be not so easy, to live in Timbuktu and to establish a matrimonial home there, just because the laws of that place are more convenient. Furthermore, public policy plays a fairly different role in family law than it does in contracts, for personal relations of a "mostly" long duration in a social environment are concerned.

The common law courts did finally decide which of the rival theories is most suitable and should therefore prevail. But still both opinions are represented and respected.

The '*antenuptial domicile*' theory was clearly supported in *Re Paine*.<sup>20</sup> In this case, a female British subject domiciled in England married 1875 her deceased sister's husband, a German subject, who lived for some time shortly before the marriage and continued to live in England. According to English law, a marriage between a woman and her deceased sister's husband was prohibited, but by German law it was allowed. The courts, in this case Bennett J. adopted the '*antenuptial domicile*' theory and held the marriage to be void because of the woman's incapacity to marry according to her '*antenuptial domicile*' law. This theory has been approved expressly in other cases in England<sup>21</sup> and in Canada.<sup>22</sup>

The '*intended matrimonial home*' theory has been supported by an Australian case in the early 1870's. In *the Will of Swan*<sup>23</sup>





a marriage was celebrated on a temporary visit in Scotland, the parties being domiciled in Victoria. The marriage, if valid, would revoke a will made by the husband before the marriage. The bride was the husband's deceased wife's niece and, although the marriage was voidable according to Victoria law, it was void according to Scots law. The marriage was held valid and the will revoked on the basis of the '*intended matrimonial*' domicile. Molesworth J. said "...the policy of the occurrence of such marriages and their results, should depend, I think, upon the laws of the country of the parties in which they are afterwards probably to live".<sup>24</sup> The '*intended matrimonial home*' was Victoria.

Unfortunately, for years and years, the supports for this theory have only been made '*obiter*',<sup>25</sup> but in a most recent case, the High Court decided the question whether of the two theories should prevail in favor of the intended matrimonial domicile theory.

This theory has been approved for the first time '*verbis expressis*' by the Family Division in *Rawdan v. Rawdan* No. 2.<sup>26</sup> In this case Cumming-Bruce J. refers '*in extenso*' to both the theories regarding a wife's capacity to contract a polygamous marriage.<sup>27</sup> After "grasping the nettle" he decides in favor of the '*intended matrimonial home*' theory on the following reasons: "And my conclusion is that the wife had the capacity to enter into a polygamous union by virtue of her pre-nuptial decision to separate herself from the land of her domicile and to make her life with her husband in his country where the Moham-  
medan law of polygamous marriage was the normal institution of marriage".<sup>28</sup> A wise, respectful and elegant decision!



Finally, it has to be said that an express choice of law by the parties entering into a marriage contract has no direct influence in the choice of the law of the matrimonial domicile, for it demands that the requirements of establishing a domicile are satisfied, it is therefore not merely a pure question of will. Furthermore, the parties should have no direct influence on the law governing relations which are more than a simple contract, but affect the whole social environment and the special nature of the long duration relationship.

#### B. Formalities

If one rule in private international law is well settled and no question arises on its value and effects, the rule that the law of the place where the marriage takes place should be satisfied as regarding to the formalities of the celebration act: '*locus regit actum*',<sup>29</sup>. This maxim means that the '*lex loci celebrationis*' shall determine whether the marriage is valid or void with reference to its form. If the marriage is valid according to the law of the place of celebration it will be valid all over the world,<sup>30</sup> and if it is invalid according to the forms of the '*locus*', it will not be recognized even if it would be valid according to the law of the parties domicile.<sup>31</sup>

This maxim is imperative on the international level<sup>32</sup> no question of choice of law arises, the '*lex loci celebrationis*' governs the formal validity of the marriage contract.<sup>33</sup>

However, there are some exceptions to this rigid statement. The two statutory exceptions and the common law exceptions do not however, affect the statement that the rule of the '*lex loci*



*celebrationis*' is of an imperative character, they are merely apparent.

As a first exception it has been said that where no local form exists,<sup>34</sup> or where the use of the local form is inappropriate<sup>35</sup> a '*common law marriage*' would be recognized as valid in England.<sup>36</sup>

The two statutory exceptions, the Foreign Marriages Acts 1892 and 1947 avoid doubts and uncertainties which can arise when marriages are celebrated in foreign countries.

A marriage celebrated in an embassy or a consulate before a marriage officer need not conform to the form requirements of the local law<sup>37</sup>. The second statutory exception deals with the marriages "within the lines of the British army serving abroad". This includes, since the Foreign Marriage Act 1947 s.2, "marriages solemnized in any foreign territory by a chaplain serving with a part of the naval, military or air forces of His Majesty's serving in that territory".

Nevertheless, the choice of law question does not arise and even the statutory exceptions do not weaken the '*locus rule*' which is imperative on an international level. Therefore, an express choice of law by the parties will never be a question. This is also the law in Canada.

However, the '*lex loci celebrationis*' again plays a dominant role in the question of the characterization of the marriage as to its monogamous or polygamous character, and the rule is not defeated.



There is some support that the '*matrimonial domicile*' law should determine whether a marriage is monogamous or polygamous through the reasoning that usually questions regarding the status of a person are dealt with by the law of his domicile. And because marriage contracts affect the status of husband and wife, the '*lex domicilii*' should determine the character of such a union. Even some judicial support has been given to this view.<sup>38</sup>

However, and as interesting as to the solution of status problems the idea would be, the application of the '*lex domicilii*' is unsound and creates difficulties as to persons married and asking for matrimonial relief in a country recognizing a monogamous marriage only, but domiciled in a country regarding the marriage as potentially polygamous.<sup>39</sup> Furthermore, a marriage concluded in a Canadian registrar office could be a polygamous marriage. Thus, where both marriage types are recognized, the '*lex loci celebrationis*' should characterize the legal nature of such a marriage.

Therefore, the view has to be approved which permits the characterization of the marriage as polygamous, potentially polygamous or monogamous in the discretion of the '*lex loci celebrationis*'. The judicial support is obviously on the side of the '*lex loci celebrationis*' and only the clearest authority should change the '*lex causae*' in such an important matter, important not only for the parties concerned, but also for the issues of such a marriage and furthermore for the whole sociological bases and notions of the marriage as a social institution. As long as *Hyde v. Hyde*<sup>40</sup> is in effect, the nature of a marriage is to be determined according to the '*lex loci celebrationis*'.<sup>41</sup>





Finally, it can be said, with Cumming-Bruce J. that "personal intention is irrelevant to the legal consequences of a validly celebrated marriage".<sup>42</sup>

This statement can be applied to the question of formalities in general and it can be said therefore, that the choice of law question in general and the question of the parties' influence on the law governing the formalities of their marriage in particular does not arise.

Only the rigid rule, the '*lex loci celebrationis*' can satisfy the postulate of clarity and security in the applicable law, which are requirements of a primary order in private international law.

### C. Inferences

The question whether an express choice of law by the parties can be applied in problems of the formation of a marriage must be answered negatively, although it seems that the '*intended matrimonial home*' rule favors the parties' influence into a choice of law question. However, this is not the case; the requirements of establishing a domicile have to be satisfied, and therefore, the compliance with the rules for the formation of the marriage is no longer purely a question of the parties' will, but it becomes a question and a criterion which seems to be as strong as the principle of the close and real connection.<sup>43</sup> With regard to the formalities and the determination of the nature of the marriage, the '*lex loci celebrationis*' is a rule with an international imperative character.



Although the parties, the husband and the wife, and questions of a highly personal character are concerned, the parties are deprived of having any influence as to the determination of the *lex causae* at all. Due to the special nature of the matrimonial relationship and in deference to the demands of society, the '*personal law*' and the local forms have to govern.

## 2. Matrimonial Causes

Matrimonial causes are defined as actions for nullity of marriage, divorce and judicial separation.<sup>44</sup> The question of choice of law in English private international law has never been prominent in matrimonial causes proceedings. Once jurisdiction has been assumed, the English courts are likely to apply the '*lex fori*' exclusively as the proper law for matrimonial causes. Jurisdiction thus, is based on domicile or residence in England, and by means of these factors, the parties have a close connection to the '*lex causae*'.

### A. Divorce and Judicial Separation

It is a well known principle in common law, that in divorce proceedings and in actions for judicial separation no choice of law problems arise and that divorce or judicial separation have always been treated as purely jurisdictional questions.<sup>45</sup>

#### (a) Divorce Proceedings

Once the court itself has assumed jurisdiction, a law other than that of the forum has never been applied. "There is little judicial discussion on this issue and no explicit choice of law rules has been established. The reason is, presumably, that at common law only the courts of the domicile had jurisdiction and accordingly applied their own law without comment."<sup>46</sup>



(i) '*Lex fori*' or '*lex domicilii*' applied by the courts?

However, the question remains without answer as to whether the law applied by the courts is to be characterized as '*lex fori*' or as '*lex domicilii*'. The qualification of the '*lex causae*' in divorce proceedings as '*lex fori*' can be supported by good reasons like "the question whether the court will dissolve a marriage is one that 'touches fundamental English conceptions of morality, religion and public policy', and one that is governed exclusively by the rules and conditions imposed by the English legislature".<sup>47</sup> On this view, no consideration of foreign factors can be made. Through the application of the '*lex fori*' as the law exclusively governing the divorce proceedings, the fact that the ground for the divorce arose, while the parties were domiciled outside the jurisdiction, is irrelevant because the application of foreign law, in this case the foreign domicile, would not be possible. There can, therefore, be no question that the misconduct is treated as a ground for divorce only if it is recognized by the '*lex fori*'. In a first case, if an act complained of is lawful at the place of the parties' domicile but unlawful at the place of the forum, it would be a sufficient ground for a successful divorce action.<sup>48</sup> On the other hand, if an act were unlawful at the parties' domicile, it would have no effect on the refusal of a relief in a later divorce action if there were no ground recognized by the '*lex fori*'.

The qualification of the '*lex causae*' in divorce proceedings as '*lex domicilii*' can be supported by the well known reason that the personal law should govern questions of status.<sup>49</sup> The





predominant justification for this qualification is that not only has the question of the parties' relationship with each other and the society to be adjusted, but also financial and liability aspects have to be satisfied. In such a case however, a divorce could not be granted if the ground for the divorce is not known by the law of the parties domicile, even if the law of the forum knows it,<sup>50</sup> or a decree should be granted even if the '*lex fori*' did not recognize the ground, but the unlawful act, unlawful by the '*lex domicilii*' has been committed at the parties' domicile and is recognized there as a sufficient ground.

The question seems to be decided upon in favor of the '*lex fori*'.<sup>51</sup> Since *Zanelli v. Zanelli*<sup>52</sup> a case in which a deserted wife was granted a divorce according to English law ('*lex fori*') although the law of her domicile, which followed her husband's and was Italian at the time of the proceedings, did not know of such matrimonial relief. This statement has been confirmed by the Matrimonial Causes Act 1965.<sup>53</sup> Thus if a wife petitions for a divorce on a ground recognized by the law of England, but not recognized by the law of her husband's (and therefore hers also) domicile, the court has power to grant relief.

In continental courts however, foreign law has often been applied in divorce proceedings. Divorce questions have been decided according to the '*lex patriae*' of the parties, and in these cases, a choice of law question was necessary.<sup>54</sup>





## (ii) The Divorce Act 1968 and Foreign Factors

In Canada, the Divorce Act 1968 contains no choice of law provision<sup>55</sup> and confirms by omission rather than by specific provision the general common law rule.<sup>56</sup> However, there is an inherent choice of law problem which has its origins in the fact that a wife can acquire a separate domicile for divorce purposes.<sup>57</sup> Therefore, it may occur that the law of the wife's domicile and the law of the husband's domicile do not contain the same grounds for divorce. It has to be suggested that the law of the forum should govern in such a case, as is provided for by the English Matrimonial Causes Act.<sup>58</sup> Moreover, the residence requirements of Section 5 ensures a significant relation and connection between the petitioner and the forum and reduces the danger of '*forum shopping*' to a minimum. The question of a '*renvoi*' never arises if the '*lex fori*' is applied and practical and social reasons support this exclusion of a choice of law strongly. The proof of foreign law and evidence thereof might be almost impossible in divorce procedures and the parties may not possess the necessary funds to cover such costs.

This situation has been contested in *Myanduk v.*

*Myanduk*.<sup>59</sup> The Supreme Court of Alberta held that the foreign factor (the parties former domicile in Poland) in a divorce proceeding is irrelevant at the forum. The husband, while domiciled in Poland committed adultery. At a later date he acquired a domicile in Alberta and the wife commenced a divorce proceeding basing her action on the husband's adultery committed while the parties' domicile was Polish. The ground for the divorce had arisen outside the jurisdiction and the court did not regard as relevant the foreign facts nor did they consider the nature



of adultery according to Polish law. The divorce was granted on the basis that adultery is a ground for divorce according to Alberta law.

The application of the '*lex fori*' in divorce actions can be sufficiently justified. The parties have a close connection to the Alberta forum through their domicile and the decision would primarily have its effects within the social environment.

The question of choice of law is answered in favor of the '*lex fori*' or, moreover, it can be said, that the question of a possible choice of law does not arise. Furthermore, the separate domicile is acquired only for jurisdictional purposes and has therefore, neither a direct nor an indirect influence on the choice of law process. Therefore, and because the parties cannot have a direct influence on the dissolution of a relationship which has not only a personal but also a social character an express choice of law by the parties will never influence a choice of law question.

#### (b) Judicial Separation

Once the court is satisfied that it has jurisdiction, referring to the parties' residence<sup>60</sup> or domicile<sup>61</sup>, a court will automatically apply domestic law. This view is supported by the same bases as the '*lex fori*' principle in divorce proceedings and there is even stronger evidence that the '*lex causae*' is to be characterized as '*lex fori*' and not as '*lex domicilii*'.<sup>62</sup> The main reasons are that the courts "would not allow a husband domiciled in abroad to exercise any authority or force over his wife which could not lawfully be exer-



cised by a husband domiciled in England".<sup>63</sup>

It has been said that divorce proceedings and actions for judicial separation are treated as purely jurisdictional questions. Once the court has satisfied its jurisdiction over the issue, based on the residence or the parties' domicile within the jurisdiction, the choice of law question does not arise. The reasons mentioned for divorce proceedings are good reasons for the actions of judicial separation as well. The '*lex fori*' governs all the substantial questions, and foreign factors are disregarded. Although the issue of actions for judicial separation is strongly in the parties' interest, they can have no influence in the choice of law.

#### B. Annulment of Marriage

In suits for nullity, the distinction between a choice of law and choice of jurisdiction is generally neglected. Once, the court is satisfied on the questions of jurisdiction, the domestic law will be applied.<sup>64</sup> Jurisdiction is based on domicile or residence of the parties within the jurisdiction or on one of the statutory exemptions of the Matrimonial Causes Act. 1965 s.40 (a) and (b).<sup>65</sup> In analogy to the proceedings for divorce, the '*lex fori*' has been applied and it seems that English authorities support this view<sup>66</sup> and a choice of law question is ignored.

Such an ignorance of the choice of law question is incompatible with the idea of private international law and it is "particularly regrettable that the personal law should be deprived of





its control over the married status. Presuming that domestic law is the same as foreign law unless evidence to the contrary is led should be no reason for a judge not to call for such evidence."<sup>67</sup>

The question of annulment of a marriage is closely connected with the formation of the relationship and the validity, generally speaking, regarding forms is governed by the '*lex loci celebrationis*'<sup>68</sup> and the validity regarding capacity by the law of the '*intended matrimonial home*'.<sup>69</sup> A physical incapacity or the lack of consent however, is governed by the '*lex fori*'.

These solutions are reasonable and need no more support. The conclusion thereof is that as with the question of establishing the relationship, the parties have no influence on the choice of law process for its dissolution by forming their own express choice.

However, the question of choice of law and the question of choice of jurisdiction are closely connected in actions for the annulment of a marriage. The case of *De Reneville v. De Reneville*<sup>70</sup> is a famous illustration thereof. Although the issue of that case is to be considered as an authority on jurisdiction rather than on choice of law,<sup>71</sup> the difficulties arising out of such situations have to be illustrated. A wife, domiciled in England before her marriage to a Frenchman, and resident in England at the time of the proceedings, petitioned for annulment of her marriage to her husband while he was resident and domiciled in France, on the grounds of his impotence, or alternatively, of his wilful refusal to consummate the marriage.





During the argument in the Court of Appeal, the main question was whether the court has jurisdiction only if the petitioner was domiciled in England. Whether the wife was domiciled in England depended on the question whether the marriage was void or voidable. If it was void ab initio the wife was domiciled in England, but if the marriage was voidable, the wife's domicile would coincide with her husband's which is French. This question could be answered only according to French Law, which opinion might be supported by Lord Greene's reasons: "The validity of a marriage so far as regards the observance of formalities is a matter for the '*lex loci celebrationis*'. But this is not a case of forms. It is a case of essential validity. By what law is that to be decided? In my opinion by the law of France, either because that is the law of the husband's domicile at the date of the marriage or (preferably in my view) because at that date it was the law of the matrimonial domicile in reference to which the parties may have been supposed to enter into the bonds of marriage."<sup>72</sup> According to Lord Greene, *De Reneville v. De Reneville* is a case on jurisdiction only and it has nothing to do with the choice of law question.<sup>73</sup> Therefore it cannot be considered as an authority answering the choice of law question in actions for nullity on the grounds of impotence or wilful refusal.<sup>74</sup> It only illustrates the '*circulus vitiosus*' within which questions of choice of jurisdiction and questions of choice of law may be intertwined.

### C. Recognition of Foreign Decrees

The recognition of foreign decrees by the courts of this country is strongly influenced by the divorce proceeding and the annulment policy. The question of recognition is a purely jurisdictional



one: as long as the jurisdiction of the foreign forum is recognized for divorce and nullity proceedings, the choice of law question and therefore the grounds on which the results were attained remain wholly immaterial.

#### (a) Divorce Decrees

The basis on which a foreign court exercised jurisdiction is immaterial for a recognition of a foreign decree. Lord Reid stated in *Indyka v. Indyka*<sup>75</sup>: "When we apply our test of domicile at present we neither recognize the validity of the ground on which the foreign court had jurisdiction under its law, nor do we pay any heed to the ground on which that court granted decree for divorce. What we do is to make our own investigation into the facts to see whether, according to our law, the husband was domiciled within the jurisdiction of the foreign court."<sup>76</sup>

The ground on which a decree was pronounced, the choice of law, is immaterial as well.<sup>77</sup> This is a decisive rule which excludes any choice of law consideration as to the recognition of foreign decrees by the courts of this country.

However, an investigation into the choice of law process of a foreign court may be unsuitable: "the interests of comity are not served if one country is too eager to criticize the standards of another country or too reluctant to recognize decrees that are valid by the law of the domicile,"<sup>78</sup> and, "English courts never investigate the propriety of the proceedings in a foreign court, unless they offend



against English views of substantial justice. When no substantial justice, according to English notions, is offended, all that English courts look to is the finality of the judgment and the jurisdiction of the court."<sup>79</sup>

Furthermore, the problem of limping marriages should not allow of a decree of divorce being re-examined by introduction of the choice of law provisions of the forum, if the requirements of recognition are met.

#### (b) Annulment of Marriage

As for divorce, the courts do not investigate the grounds on which the foreign court annulled the marriage, except if its recognition would be contrary to public policy or to natural justice. "It is well established that the English courts recognize the jurisdiction of a foreign court to annul a marriage, the ground on which that marriage was annulled by the foreign court is wholly immaterial."<sup>80</sup>

#### D. Inferences

Matrimonial causes are treated as merely jurisdictional problems. Although questions may arise regarding the qualification of the '*lex causae*' as '*lex fori*' or as '*lex domicilii*', or regarding to the acquisition of a separate domicile for divorce purposes by the wife, the choice of law question does not arise. The problems remain jurisdictional ones, and the link between the petitioner and the forum, strengthened by the requirements for establishing such a link, are sound reasons that the exclusive application of the '*lex fori*' in matrimonial causes is regarded as a proper solution.





In analogy to divorce proceedings, the problems are centered on jurisdictional issues for nullity actions.

The character of matrimonial causes permit no influence by the parties on the choice of law process, which could arise with regard to the problems arising out of the qualification of the '*lex causae*' and the wife's divorce domicile. As for the formation of the matrimonial relation<sup>81</sup> the interest of the society and the community, the termination of such a special contract cannot be within the parties discretion as to influencing the legal issues.

The character of the matrimonial relation demands a rigid and fixed rule which can only be found in the '*lex fori*'. Furthermore, the '*lex fori*' bears advantages for the proceedings in our courts which cannot be missed. The judge applies the law he is familiar with, the parties do not have to face extreme costs for the proof of foreign law. The situation surely is different from that of rich companies and merchants and their contracts made by people who are familiar with legal drafting and proceedings. Furthermore, the parties, through their close link to the courts in that particular jurisdiction, are familiar with the legal system themselves.

### III. Conclusions

The nature of the matrimonial relationship, the 'marriage contract' is influenced not only by the parties involved but also by the community and the society within which they live. It has, therefore, not only the function of ruling the living together of the family





but it has also a social function, which has been described as a cornerstone of the society and the nation. Matrimonial relations have on the one hand a strong personal value, this is the reason why the '*personal law*' of the parties governs the legal aspects of such relations, and furthermore, a strong sociological value, the reason why the parties cannot have a further influence on such kinds of relations than the '*personal law*' allows.<sup>82</sup>

Therefore, the question of capacity to marry is to be governed by the law of the '*intended matrimonial home*'.<sup>83</sup> This solution alone can take into account the parties' and the society's interest in the essential validity of such a special contract. However, it might be assumed that, by the choice of the matrimonial domicile the parties may have a direct influence on the choice of law process regarding the essential validity of their marriage. This however is not the case, for the requirements of establishing a new domicile have to be satisfied, which is not solely a question of a pure act of will. Furthermore, influencing the choice of law process by means of choosing a domicile is not exercising party autonomy. It only moves the objective connecting factor, the domicile, from one into another jurisdiction. The objective connection is not substituted by a subjective connection. A question of status, that of whether a person is married or single, is involved and the parties must not be allowed to exert any influence on the choice of law process at all.<sup>84</sup>

As to the formalities of the creation of a matrimonial contract, the rule that the '*lex loci celebrationis*' must be satisfied stands forth clearly.<sup>85</sup> However, as to the characterization of the marriage as a polygamous, potentially polygamous or a monogamous union, a choice of law question might arise. Although the '*lex loci celebrationis*' plays the dominant role, some support has been given to the



'intended matrimonial home' law to govern questions of characterization of the nature of the marriage. Nevertheless, only the '*lex loci celebrationis*' can decide on questions which are strongly connected with the moral and religious principles of such unions, contracted under the law. The choice of law question does not arise at all; the parties' influence can never be a question as to what law should be satisfied concerning formalities of the matrimonial union.

In matrimonial causes, choice of law has never been prominent. Jurisdiction has always been the issue of the choice-question and the '*lex fori*' has been applied; with which one can only agree.<sup>86</sup> Even the Divorce Act 1968 does not consider the choice of law issue, although a choice of law problem is inherent because of the wife's capacity to acquire a separate domicile for divorce purposes. Nevertheless, the '*lex fori*' defends its predominance. Even if the action is based on '*foreign facts*', the '*lex fori*' alone governs the proceedings. The choice of law question does not arise at all. Because of the special nature of the marriage contract the parties cannot influence the choice of law process. The same reasons are valid for judicial separation.<sup>87</sup>

Actions for nullity are closely connected to the rules governing the formation of the marriage.<sup>88</sup> Furthermore, the question of a choice of law has been neglected because its answer depends wholly on the choice of jurisdiction issue and vice-versa: a '*circulus vitiosus*'. Therefore, the questions of annulment based on lack of capacity or lack of validity regarding forms, the law of the '*intended matrimonial home*' and the '*lex loci celebrationis*' are applied on, and as for the



establishing of the matrimonial contract, the parties have no influence into the choice of law process. Lack of consent and physical incapacity are governed by the '*lex fori*'.

The recognition of foreign decrees by the courts of this country is strongly influenced by its divorce and nullity policy.<sup>89</sup> For both, divorce and nullity decrees, the courts do not investigate the grounds on which the decision was made except if the recognition is contrary to public policy or to natural justice. The choice of law question does not arise.

Although the parties are strongly concerned with the choice of law issues in problems of matrimonial relations, they are not allowed to exert any influence on the choice of law process by an expressed will. The interest of the community and of the society as a third person is too strong to be disregarded.



#### IV. Footnotes to Chapter Three, Third Subtitle

1. Cheshire, *The English Private International Law of Husband and Wife*, (1963-I) *Receuil des cours* 119, *cit.* Cheshire; *Mordaunt v. Mordaunt* (1870) L.R. 2P. & D.109 per L. Penzance at 126.
2. *Lang v. Lang* [1921] Sess. Cas. 44, per Lord President Clyde at 51.
3. *Hyde v. Hyde* (1866) L.R. IP & D 130.
4. Such defects as there are mentioned in the Divorce Act 1967-1968 c.24s.3 and s.4.
5. *Ditson v. Ditson* (1856) 2 R.I.87,101 (USA) per Ames, L.J. cited in Goodrich, *Conflict of Laws*, 349.
6. Cheshire-North 289.
7. Cheshire, *supra* n.1, 136.
8. *Sottomayor v. DeBarros* No. 1 (1877) 3 P.D.1;  
*Brook v. Brook* (1861) 9 H.C.L. L93;  
*Simonin v. Mallac* (1860) 2 Sw & Tr 67;  
*Ambrose v. Ambrose* (1960) 32 W.W.R. 433.
9. Cheshire, *supra* n.1, 136. and see *infra* 100 *et. seq.*
10. [1968] 2 Q.B. 956; [1968] 3 All E.R. 279.
11. Dicey, *Conflict of Laws*, 257.
12. Cook, *Logical and Legal Bases of Conflict of Laws*, 447.
13. Cheshire-North 310.
14. Graveson, *Matrimonial Domicile and the Contract of Marriage*, (1938) XX *Journal of Comp. Legislation and int. law* 55 at 60.
15. Guthrie's translation s.379 at 240.
16. Dicey & Morris 258.
17. Cheshire-North 313.
18. *Id.*
19. Cmd. 9678 395 (1956); Draft Code, C1.4 (3).
20. [1940] Ch. 46; and see Schmittoff, *Validity of Marriage and the Conflict of Laws*, (1940) 56 L.Q.R. 514.





21. *Pugh v. Pugh* [1951] P.482; *Padolecchia v. Padolecchia* [1968] P. 314, [1967] 3 All. E.R. 863.
22. *Crickmay v. Crickmay* (1967) 60 D.L.R. (2d) 734.
23. (1871) 2 U.R. (I.E. & M.) 47.
24. *Id.* at 50.
25. So in *De Reneville v. De Reneville* [1948] P. 100 per Lord Green at 114, per Bucknill L.J. at 121/122; *Casey v. Casey* [1949] P. 420 at 429/430; *Kenward v. Kenward* [1950] 2 All. E.R. 297 at 310.
26. [1972] 2 All E.R. 1026.
27. *Id.* at 1032 *et seq.*
28. *Id.* at 1040.
29. *Scrimshire v. Scrimshire* (1752) 2 Hag. Can. 395; *Berthiaume v. Dastous* [1930] A.C. 79 at 83.
30. *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67.
31. *Berthiaume v. Dastous* [1930] A.C. 79 at 83
32. Morris 88, Cheshire-North 324, Cheshire, *supra* n.1, 156, Graveson 281, and *see supra* n. 29.
33. Although the marriage invalid by the local law at the time of the celebration will be subsequently validated by retrospective legislation at the place of the celebration. *Starkowsky v. A.- G.* [1954] A.C. 155; *Ambrose v. Ambrose* (1961) 25 D.L.R. (2d) 1.
34. *Wolfenden v. Wolfenden* [1946] P. 61; [1945] 2 All E.R. 539.
35. *Holdowanski v. Holdowanska* [1956] 2 W.L.R. 935.
36. The question still is open if it would not be appropriate to look at the '*lex domicilii*' of foreigners domiciled abroad and marrying in another foreign country, than applying the law of England only.
37. Foreign Marriage Act 1892 s.1.  
Foreign Marriage Act 1947 ss. 5,6.
38. *Warrender v. Warrender* (1835) 2 Cl & Fin 488;  
*Kenward v. Kenward* [1951] P. 124.  
*Jackson, Monogamous Polygamy*, (1966/67) 40 A.L.J. 148.



39. Example by Cheshire-North 295.
40. (1866) L.R. IP & D 130.
41. In *Lee v. Lau* [1967] P. 14 the '*lex loci celebrationis*' determined the nature and the incidents of the union but the '*lex fori*' should have the ultimate decision on the classification, with issue of a classification in general, per Carns, J.
42. *Ali v. Ali* [1966] 1 All E.R. 664 at 669.
43. *Supra* 73.
44. Supreme Court of Judicature Act 1925 s. 225.
45. Morris 134, Cheshire-North 353, Cheshire, *supra* n.1, 163 Graveson 296.
46. Mendes da Costa, *Some Comments on the Conflict of Laws Provision of the Divorce Act, 1968*, (1968) 46 Can. Bar. Rev. 277.
47. Cheshire-North 353, Wolff 373/374, Dicey Conflicts 6th ed. 236/7.
48. *Cremer v. Cremer* (1905) 30 Victorian L.R. 532  
*Boyd v. Boyd* [1913] Victorian L.R. 282.
49. *Supra* 97 *et seq.*
50. *Zanelli v. Zanelli* (1948) 64 T.L.R. 556.
51. *LeMesurier v. LeMesurier*, [1895] A.C. 517.
52. (1948) 64 T.L.R. 556.
53. s. 40 (2).
54. *Arrêt Rivière* (1953) 42 Rev. Crit. 412; Art. 17 EGBGB; but cf. Art. 7g NAG and Art. 7f NAG which are based on the same idea as common law.
55. Mendes da Costa 278.
56. *Walker v. Walker* [1950] 4 DLR 253.  
*Goldenberg v. Triffon* [1955] Que. S.C. 341.  
*Pledge v. Walter* (1961) 36 WWR 95 (Alta.)
57. s.5.
58. *Supra* 107.
59. [1931] 2 D.L.R. 693 (Alta.S.C.).



60. *Armstrong v. Armstrong* [1898] P. 1178.  
*Anghinelli v. Anghinelli* [1918] P. 247.  
*Sinclair v. Sinclair* [1968] P. 189; [1967] 3 All E.R. 882.
61. *Eustace v. Eustace* [1924] P. 45.
62. *Supra* 124; *Cheshire-North* 413, *Cheshire* 171, *Morris* 154.
63. *Dicey-Morris* 336/337.
64. *Kassim v. Kassim* [1962] P. 224; [1962] 3 All ER 420.  
*Buckland v. Buckland* [1968] P. 296; [1967] 2 All ER 300.
65. Matrimonial Causes Act. 1965 s. 40 (a) where the husband was domiciled in England prior to the desertion s.40 (b): Requirement of three years residence for establish jurisdiction.
66. *Easterbrook v. Easterbrook* [1944] P. 10.  
*Hutter v. Hutter* [1948] P.100, 117 per Lord Green M.R.  
*Ross Smith v. Ross Smith* [1963] A.C. 280.
67. See *Falconbridge, Annulment Jurisdiction and Law: Void and Voidable Marriages* (1948) 26 Can.Bar Rev. 907 at P. 915.
68. *Berthiaume v. Dastous* [1930] A.C. 79.
69. *Radwan v. Radwan* No. 2. [1972] 3 All E.R. 1026.
70. [1948] P. 100.
71. *Cheshire-North* 384/385, 396/397; *Morris* 163.
72. At 114.
73. *Morris* 163.
74. *Dicey and Morris* 366.
75. *Indyka v. Indyka* [1969] 1 A.C.33.
76. At 66 C.
77. *Mezger v. Mezger* [1937] P. 19.  
*Igra v. Igra* [1951] P. 404.  
*Indyka v. Indyka* [1969] 1 A.C. 33.
78. *Igra v. Igra* [1951] P. 404, at p. 412 per Pearce, J.
79. *Pemberton v. Hughes* [1899] 1 Ch 781,793 per Lindley, M.R.
80. *Corbett v. Corbett* [1951] 1 W.L.R. 486 at P. 490.
81. *Supra* 97.



- 82. *Supra* 95 *et seq.*
- 83. *Supra* 102
- 84. *Supra* 97
- 85. *Supra* 106
- 86. *Supra* 110
- 87. *Supra* 114
- 88. *Supra* 115 *et seq.*
- 89. *Supra* 117 *et seq.*





## C O N C L U S I O N

The liberal concept of a system of law, based on the idea that a human being, in achieving a completeness of freedom, should be able to regulate his legal relations according to his own desires, leads to the principle of '*private autonomy*' in internal municipal law and to the principle of '*party autonomy*' in the private international law.

'*Party autonomy*' has been derived from the liberal concept and has been defined as the parties' capacity to choose the law governing their international relations. Party autonomy should be applied wherever the choice of law question arises, and wherever the issue of this question is of the parties' personal concern and no interest of the public or other third parties is endangered.

This principle found its application in the domain of contracts, where it has been said that the express choice of law is one of the possible application of the 'proper law' rule. Upon the choice of a legal system which is already objectively connected with the contract. The express choice of law is not restricted. Moreover, a free unlimited choice of law has been advocated, provided that the contract is an international contract. The requirement of internationality has to be judged upon by objective criterias which establish the foreign connection.

The proper law theory has also been introduced in the international law of torts, as a consequence of the unsatisfactory



solution of the '*lex loci delicti commissi*' and the '*lex fori*' and the English double rule of combined application. The express choice of law by the parties, as a possible subjective connection, is only one part of the 'proper law' doctrine. This connecting factor has to be accepted in its fullest extent as defined for the law of contracts. The essential gain consists of certainty and just results in the conflict's sense.

In the law of matrimonial relations the influences of the 'party autonomy' principle should also be considered because of the strong personal interest of the parties concerned. However, the nature of the matrimonial relation is not only concerned with the personal interest of the parties, but also with public interest. The public concern demands clearness and lucidity of the law governing matrimonial relations; the parties interest can never prevail.

Furthermore, for effective, practical and swift procedure in questions of dissolution of such relations, only the '*lex fori*' principle is appropriate.

Only where no strong third party interests are infringed can the 'party autonomy' principle maintain its influence and there it should be applied freely, without limitations.



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## A B B R E V I A T I O N S

BGB	Entscheidungen des Schweizerischen Bundesgerichts (Switzerland)
EGBGB	Einfuehrungsgesetz zum Buergerlichen Gesetzbuch (Germany)
NAG	Bundesgesetz betreffend die Niedergelassenen und Auf- enthalter in der Schweiz (Switzerland)
RGZ	Entscheidungen des Reichsgerichts (Germany)
SVG	Bundesgesetz ueber den Strassenverkehr (Switzerland)
ZSR n.F.	Zeitschrift fuer schweizerisches Recht, neue Folge (Switzerland)

















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